



LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W



February 1, 2024

Attorney General Merrick Garland
Assistant Attorney General Kristen Clarke
Department of Justice
950 Pennsylvania Avenue NW
Washington DC 20530

Via email

RE: Comprehensive Use of Civil Rights Authorities to Prevent and Combat Algorithmic Discrimination

Dear Attorney General Garland and Assistant Attorney General Clarke,

We, the undersigned groups, write to you with specific recommendations on implementing the recently-signed Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (EO 14110). The EO directs the Department of Justice's Civil Rights Division (DOJ CRT) to convene, within 90 days of the date of the Executive Order, a meeting of the heads of Federal civil rights offices to "discuss comprehensive use of their respective authorities" to "prevent and address discrimination in the use of automated systems, including algorithmic discrimination."¹ It also directs you to "increase coordination between the Department of Justice's Civil Rights Division and Federal civil rights offices concerning issues related to AI and algorithmic discrimination,"² and to "develop, as appropriate, additional training, technical assistance, guidance, or other resources."³

We commend the work that DOJ CRT and other civil rights enforcement agencies have done so far in combating algorithmic discrimination, and for quickly convening in

¹ Executive Order 14110, Section 7(a)(ii), "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," 88 Fed. Reg. 75191 (Nov. 1, 2023), <https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence>.

² Executive Order 14110, Section 7(a)(ii).

³ Id.

response to EO 14110.⁴ In particular, we are grateful that the participants at the convening “pledged to continue collaboration” to combat algorithmic discrimination and also “agreed to partner on external stakeholder engagement around their collective efforts to advance equity and civil rights in AI.”⁵ However, more can and must be done. Two years ago, Assistant Attorney General Clarke noted that the DOJ CRT was “reviewing whether guidance on algorithmic fairness and the use of AI may be necessary and effective.”⁶ We believe that such guidance — and more — is necessary, especially in light of the Executive Order and the urgency due to the harms of algorithmic discrimination. In particular, the undersigned groups urge you to:

- **Develop and issue an Interagency Policy Statement on algorithmic discrimination.** While the CFPB, DOJ CRT, EEOC, and FTC jointly stated that existing legal authorities apply to the use of automated systems, more guidance is necessary. An Interagency Policy Statement would describe the general principles agencies will consider in determining whether unlawful algorithmic discrimination exists and provide a foundation for future regulatory and enforcement actions.
- **Alongside civil rights enforcement agencies, establish an interagency working group to develop and expand the federal government’s own anti-discrimination testing capabilities to uncover algorithmic discrimination.** A dedicated interagency working group should be charged with developing and expanding anti-discrimination testing capabilities, assistance on enforcement cases, and other efforts to combat algorithmic discrimination.
- **Pursue opportunities to require covered entities to perform regular anti-discrimination testing of their systems and regularly search for less discriminatory algorithms.** Existing authorities support these approaches. Beyond an Interagency Policy Statement, agencies should take steps to clarify expectations on the private sector to proactively combat algorithmic discrimination.
- **Urge civil rights enforcement agencies to require covered entities to collect demographic information for anti-discrimination purposes.** Efforts to combat

⁴ Department of Justice, “Readout of Justice Department’s Interagency Convening on Advancing Equity in Artificial Intelligence,” (Jan. 11, 2024), <https://www.justice.gov/opa/pr/readout-justice-departments-interagency-convening-advancing-equity-artificial-intelligence>.

⁵ Id.

⁶ Assistant Attorney General Kristen Clarke, “Keynote on AI and Civil Rights for the Department of Commerce’s National Telecommunications and Information Administration’s Virtual Listening Session,” (Dec. 14, 2021), <https://www.justice.gov/opa/speech/assistant-attorney-general-kristen-clarke-delivers-keynote-ai-and-civil-rights-department>.

algorithmic discrimination will be most effective when covered entities are required to collect certain demographic information for anti-discrimination testing purposes.

- **Hold monthly meetings to provide external stakeholders with regular updates about progress on AI EO implementation.** DOJ CRT should also host an annual workshop focused on research and methodologies aimed at combating algorithmic discrimination, similar to the role the FTC’s PrivacyCon plays for consumer privacy and data security.

The DOJ CRT, alongside its partner civil rights enforcement agencies, has the responsibility to launch a landmark effort to ensure that covered entities address algorithmic discrimination in civil rights areas. Each of the recommendations we set forth will require civil rights enforcement agencies to ensure that sufficient staffing resources are in place. We would be pleased to discuss the proposals in this memo in more detail in the weeks and months ahead.

1. DOJ CRT and civil rights enforcement agencies should develop and issue an Interagency Policy Statement on Algorithmic Discrimination.

Recently, the CFPB, DOJ CRT, EEOC, and FTC jointly stated that “[e]xisting legal authorities apply to the use of automated systems and innovative new technologies just as they apply to other practices.”⁷ Given the aims and directives of EO 14110, we believe that the agencies can expand upon these statements through an Interagency Policy Statement on Algorithmic Discrimination. An Interagency Policy Statement on Algorithmic Discrimination by civil rights enforcement and consumer protection agencies would help clarify covered entities’ obligations and regulators’ expectations regarding aspects of anti-discrimination testing of algorithmic systems. Civil rights organizations and industry

⁷ Consumer Financial Protection Bureau, Equal Employment Opportunity Commission, the Department of Justice Civil Rights Division, and the Federal Trade Commission, Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems, (Apr. 25, 2023), https://www.justice.gov/d9/pages/attachments/2023/04/25/joint_statement_on_enforcement_efforts_against_discrimination_and_bias_in_automated_systems_0.pdf.

have repeatedly called for such clarification.⁸ Such a statement would allow the agencies to describe the general principles that agencies will consider in determining if unlawful algorithmic discrimination exists and provide a foundation for future regulatory and enforcement actions.⁹

The Interagency Policy Statement should make three points clear. First, when covered entities use algorithmic systems in civil rights areas, they are expected to routinely test their models for disparate impact. Second, covered entities should proactively search for less discriminatory alternatives, and adopt them when they are available and viable. In particular, regulators should clarify that they expect covered entities to have clearly documented practices, methods, and policies detailing how they perform disparate impact testing, how they search for less discriminatory alternatives, how they determine when they will adopt a less discriminatory alternative, and their reasons for not adopting less discriminatory alternatives they find in specific circumstances.¹⁰ Failure to take these basic steps should, by itself, be understood as a violation of federal anti-discrimination law.¹¹

⁸ See, e.g., National Fair Housing Alliance, “Re: Docket No. CFPB-2020-0026 Request for Information on the Equal Credit Opportunity Act and Regulation B,” (Dec. 1, 2020), <https://nationalfairhousing.org/wp-content/uploads/2021/05/NFHA-Comments-CFPB-ECOA-RFI-FINAL.pdf> (calling on CFPB to “use its regulatory and supervisory tools to ensure that entities’ compliance management systems include routinely testing policies and models for disparate impact and actively searching for, and adopting, less discriminatory alternatives where they are available”); Center for Democracy and Technology, et al., *Civil Rights Standards for 21st Century Employment Selection Procedures*, (2022), <https://cdt.org/wp-content/uploads/2022/12/updated-2022-12-05-Civil-Rights-Standards-for-21st-Century-Employment-Selection-Procedures.pdf> (detailing auditing standards that would require companies to take a proactive approach to mitigating discrimination by identifying and anticipating discriminatory barriers throughout a selection procedure’s lifecycle and exploring alternative selection procedures that might reduce or eliminate potential sources of discrimination); National Community Reinvestment Coalition, Upturn, and Zest AI, “RE: CFPB Tools for Ensuring That Creditors Do Not Rely on Discriminatory Models,” (Mar. 11, 2022), <https://ncrc.org/cfpb-should-encourage-lenders-to-look-for-less-discriminatory-models/> (calling on the CFPB to make “clear that it expects entities to meaningfully, effectively, and routinely search for and adopt LDA models, and that it may favorably consider such efforts in assessing supervisory and enforcement activities”).

⁹ Examples include, but are not limited to, Title VI, Title VII, ECOA, FHA, FTC Act, FCRA, ADA, and the ACA.

¹⁰ For an extended discussion on the legal justification for a duty to perform anti-discrimination testing and search for less discriminatory algorithms, see Emily Black, John Logan Koepke, Pauline Kim, Solon Barocas, Mingwei Hsu, *Less Discriminatory Algorithms*, (Oct. 2, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4590481.

¹¹ Id.

Third, less discriminatory algorithms need not necessarily be “equally effective” in their performance to be considered a viable alternative, only “comparably effective.”¹²

The agencies should also clarify that viable less discriminatory alternatives can sometimes require companies to bear certain material costs. Such costs may include a reasonable reduction in model performance or accuracy to reduce disparate impact. To be most helpful, the statement should include examples of disparate treatment and disparate impact as facilitated by algorithmic systems, as the April 1994 Interagency Policy Statement on Discrimination in Lending does for general policies and practices.¹³

The agencies should use the statement to clarify that they are on firm legal ground when they require covered entities to collect demographic data to advance the goals of federal

¹² A joint policy statement would allow the agencies to clarify that alternatives need only be “comparably effective,” which existing agency guidance supports, though existing documents offer varying standards for how similarly an alternative must advance a relevant business purpose. For example, interagency procedures have variously noted that less discriminatory alternatives need to be “approximately equally effective,” “equally effective,” or “serve the same purpose with less discriminatory effect.” See OCC, FDIC, FRB, OTS, NCUA, Interagency Fair Lending Examination Procedures - Appendix, (Aug. 2009) - Appendix 26-27; also see, OCC, FDIC, FRB, OTS, NCUA, Interagency Fair Lending Examination Procedures, (Aug. 2009), iv. Separate guidance documents from the Office of the Comptroller of the Currency and the Federal Housing Finance Authority (FHFA) have suggested that a less discriminatory alternative need not be equally effective, but only comparably so. See OCC, “OCC Bulletin 1997-24, Credit Scoring Models: Examination Guidance,” (May 20, 1997); also see Federal Housing Finance Agency, AB 2021-04, (Dec. 20, 2021). Recent guidance from the EEOC suggested alternatives need only be “comparably effective.” See U.S. Equal Employment Opportunity Commission, “Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964,” (May 18, 2023). However, in separate guidance regarding employer’s consideration of arrest and conviction records, the EEOC has separately suggested that the relevant question is whether or not the alternative “serves the employer’s legitimate goals as effectively as the challenged practice.” See U.S. Equal Employment Opportunity Commission, “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act,” (Apr. 25, 2012). Meanwhile, in its 2013 disparate effects rulemaking, HUD observed that “equally effective” as a standard to judge less discriminatory alternatives is “less appropriate in the housing context than in the employment area in light of the wider range and variety of practices covered by the Act that are not readily quantifiable.” See Department of Housing and Urban Development, Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11,473 (Feb. 15, 2013).

¹³ HUD, DOJ, OCC, OTS, Fed. Rsv. Bd., FDIC, FHFB, FTC, NCUA, Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266 (Apr. 15, 1994), <https://www.govinfo.gov/content/pkg/FR-1994-04-15/html/94-9214.htm>. One helpful resource is the Federal Housing Finance Agency’s recent Advisory Bulletin, which offers examples of algorithmic discrimination. See Federal Housing Finance Agency, AB2021-04, (Dec. 20, 2021), <https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/AdvisoryBulletinDocuments/AB%202021-04%20Enterprise%20Fair%20Lending%20and%20Fair%20Housing%20Compliance.pdf>. Similarly, federal financial regulatory agencies have used interagency policy statements to call on covered entities to invest in anti-discrimination methods and practices. See Fed. Rsv. Bd., FDIC, NCUA, OCC, OTS, *Interagency Policy Statement on Fair Mortgage Lending Practices*, (Oct. 9, 1992), <https://www.federalreserve.gov/bankinfo/interagencystatement.htm>.

anti-discrimination law. Further, agencies should offer high-level guidance on how covered entities should reason through a model development process that surfaces multiple viable less discriminatory algorithms. For example, the agencies could state that they will favorably view efforts to deploy a model that is slightly less accurate that reduces disparate impact, and an entity's decision to explore a broad range of alternatives.¹⁴

2. DOJ CRT should work with civil rights enforcement agencies to establish an interagency working group to solidify and expand the federal government's own anti-discrimination testing capabilities to uncover algorithmic discrimination.

EO 14110 tasks the DOJ with coordinating and supporting agencies in their implementation of and enforcement of existing federal anti-discrimination law to address discrimination related to AI.¹⁵ For this work to be the most effective, DOJ CRT should, in concert with other civil rights enforcement agencies, establish a dedicated interagency working group that develops and expands the federal government's own anti-discrimination testing capabilities to uncover algorithmic discrimination.

The federal government has long used covert testing to uncover evidence of discrimination by landlords, lenders, and others.¹⁶ Such affirmative testing is critical where "discrimination is hidden or hard to detect [and it] provides an indispensable tool for uncovering and exposing discriminatory policies and practices."¹⁷ Just as the federal government stood up anti-discrimination testing efforts to detect discrimination in the physical world,¹⁸ it must invest in capabilities to detect discrimination in digital systems.

¹⁴ National Community Reinvestment Coalition, Upturn, and Zest AI, "RE: CFPB Tools for Ensuring That Creditors Do Not Rely on Discriminatory Models," (Mar. 11, 2022), <https://nrcr.org/cfpb-should-encourage-lenders-to-look-for-less-discriminatory-models/>.

¹⁵ Executive Order 14110, Section 7.1(i).

¹⁶ Claudia L. Aranda, Housing Discrimination in America: Lessons From the Last Decade of Paired-Testing Research, Statement before the Subcommittee on Transportation, Housing and Urban Development and Related Agencies at 3 (Feb. 27, 2019), https://www.urban.org/sites/default/files/publication/99836/housing_discrimination_in_america_-_claudia_aranda.pdf.

¹⁷ Department of Justice, *The DOJ Fair Housing Testing Program: Three Decades of Guarding Civil Rights* at 4 (Apr. 2022), <https://www.justice.gov/crt/page/file/1497551/download>.

¹⁸ Since its formation in 1991, the Department of Justice's Fair Housing Testing Program has sought to uncover unlawful discrimination under statutes like the Fair Housing Act, Title II of the Civil Rights Act of 1964, the Equal Credit Opportunity Act, and the Americans with Disabilities Act. Beyond DOJ and HUD, a few other agencies have also piloted testing programs, from the Federal Reserve Board, to the Office of the Comptroller of the Currency, to the Equal Employment Opportunity Commission, and the Office of Federal Contract Compliance Programs. See Government Accounting Office, *Fair Lending: Federal Oversight and Enforcement Improved but Some Challenges Remain* at 61 (Aug. 1996), <https://www.govinfo.gov/content/pkg/GAOREPORTS-GGD-96-145/pdf/GAOREPORTS-GGD-96-145.pdf>;

To do so, DOJ CRT should, alongside civil rights enforcement agencies, establish a formal interagency working group that is charged with implementing and expanding anti-discrimination testing capabilities, assisting on related cases and other efforts to combat algorithmic discrimination, and coordinating with the relevant technology offices at agencies tasked with enforcing relevant civil rights laws. This interagency working group should work to develop best practices and procedures for performing anti-discrimination testing of algorithmic systems, including the development of new methods to uncover discrimination and best practices on the use of inference methodologies to infer protected class status where necessary.¹⁹

The interagency working group can help develop federal standards for conducting civil rights audits and assessments of algorithmic systems that affect covered areas, such as housing, jobs, and lending and develop a playbook for testing algorithms for discrimination. Such a playbook could cover how entities should define the scope of relevant measurement, clarify the protected characteristics to be measured and practices regarding obtaining and processing demographic data, provide guidance for conducting intersectional measurement (in particular, when certain demographics and intersectional groups represent a small portion of the relevant population such that measurement may result in statistically insignificant findings), define the scope of a legitimate business purpose if less discriminatory alternatives cannot be found or implemented, and discuss recommended remedies where discriminatory effects are identified.

A dedicated working group could share information and learn from each other's efforts and provide a common space to meet with outside experts. The body could also explore needs related to training agency investigators, conducting research studies on AI-driven technologies, and ensuring sufficient agency funding for such purposes.

3. DOJ CRT should further discuss with agencies all opportunities to require covered entities to perform regular anti-discrimination testing of their systems, and consider opportunities that would shift the burden to companies to regularly search for less discriminatory algorithms.

DOJ CRT should explore with civil rights and consumer protection agencies the various approaches they could take to ensure that regulated entities regularly test their systems for disparate treatment and disparate impact. Beyond an Interagency Policy Statement, DOJ

also see, Darrick Hamilton, Rebecca Dixon, *Shifting the Burden of Proof: Using Audit Testing to Proactively Root Out Workplace Discrimination* (Sep. 14, 2022), <https://www.nelp.org/publication/using-audit-testing-to-proactively-root-out-workplace-discrimination>.

¹⁹ See Recommendation 4.

CRT and certain other agencies are encouraged or explicitly required by EO 14110 to issue guidance or technical assistance on addressing AI's impacts in their respective areas of enforcement.²⁰ These agencies, as well as DOJ CRT and other relevant enforcement agencies, should publish guidance explaining what disparate treatment and disparate impact look like with respect to algorithmic discrimination, how to perform anti-discrimination testing rigorously enough to detect and mitigate bias, and how to provide transparency regarding the testing results to the public and regulators.

Each agency's guidance should set forth expectations and considerations that are specific to their areas of enforcement, and should be directly informed by input from affected groups, their advocates, and experts on the application of civil rights laws to AI. Stakeholder engagement as described below will be invaluable to ensuring these resources are as instructive as possible. Consultation with the National Institute of Standards and Technology (NIST) would be helpful as well — NIST could advise agencies on applying its AI risk management framework through anti-discrimination testing, and recommend a standard for testing that agencies can adapt to their respective areas of enforcement. Agencies should also consider how the expected service appointments can increase the necessary internal subject matter expertise to develop anti-discrimination testing guidance.²¹

In addition, agencies should explore opportunities to clarify that regulated entities are obligated to regularly search for less discriminatory algorithmic and non-algorithmic alternatives to the models they deploy. Existing authorities support these approaches — to avoid liability, covered entities generally must be prepared to demonstrate that their models are necessary to serve a legitimate business interest and that there is no less discriminatory alternative that satisfies that interest. Since the process of developing and updating a model is iterative, less discriminatory versions of the model that are sufficient to fulfill the business interest are almost always available.²² Agencies should clarify that covered entities should retain these algorithmic alternatives when developed internally, ensure that contracts with third-party developers provide covered entities with an explanation of and access to these alternatives, and establish non-algorithmic alternatives wherever possible.

²⁰ See Executive Order 14110, Secs. 6(b), 7.1(a)(iii), 7.2(b), 7.3, and 8(b)(iii)(A)-(B).

²¹ Office of Personnel Management, Government-wide Hiring Authorities for Advancing Federal Government Use of Artificial Intelligence, (Dec. 29, 2023), <https://chcoc.gov/content/government-wide-hiring-authorities-advancing-federal-government-use-artificial-intelligence>.

²² See Emily Black, John Logan Koepke, Pauline Kim, Solon Barocas, Mingwei Hsu, *Less Discriminatory Algorithms*, (Oct. 2, 2023).

4. DOJ CRT should urge civil rights enforcement agencies to require covered entities to collect demographic information for anti-discrimination purposes.

Efforts to combat algorithmic discrimination will be most effective when covered entities in the private sector are required to collect certain demographic information for anti-discrimination testing purposes in a privacy protective manner. While in certain contexts covered by federal civil rights law, expectations that such data be collected are clear — such as for employment selection procedures — in other cases such data collection remains underspecified or prohibited, stymying efforts to detect and prevent unlawful discrimination. Practitioners have found this lack of clarity to be a significant barrier to implementing bias measurement and mitigation efforts.²³

Historically, prohibitions on the collection of demographic data have also stymied anti-discrimination enforcement efforts. As one example, when the Federal Reserve Board considered lifting Regulation B’s general prohibition on the collection of demographic information for the second time, starting in 1998, it did so in part “in response to concerns that continue to be expressed by the Department of Justice and some of the federal financial enforcement agencies” who believed that “the ability to obtain and analyze data about race and ethnicity ... would aid fair lending enforcement.”²⁴ During that rulemaking, the Federal Reserve Board noted that “most of the federal financial enforcement agencies, the Department of Justice, the Department of Housing and Urban Development, small businesses and their trade associations, consumer advocates, community organizations, and some banks” favored removing the prohibition.²⁵ DOJ CRT should call upon all civil rights enforcement agencies to require covered entities to collect certain demographic information for anti-discrimination testing.

Where existing prohibitions on the collection of demographic data cannot be lifted

²³ See, e.g., McKane Andrus, Elena Spitzer, Jeffrey Brown, and Alice Xiang, *What We Can’t Measure, We Can’t Understand: Challenges to Demographic Data Procurement in the Pursuit of Fairness*, In Proceedings of the 2021 ACM conference on Fairness, Accountability, and Transparency, pp. 249–260, (2021), <https://dl.acm.org/doi/10.1145/3442188.3445888> (noting that almost every practitioner the researchers interviewed “described access to demographic data as a significant barrier to implementing various fairness techniques”); also see Michael Madaio, Lisa Egede, Hariharan Subramonyam, Jennifer Wortman Vaughan, Hanna Wallach, *Assessing the Fairness of AI Systems: AI Practitioners’ Processes, Challenges, and Needs for Support*, In Proceedings of the ACM on Human-Computer Interaction 6, CSCW 1 (2022), 1-26 <https://dl.acm.org/doi/10.1145/3512899> (noting the tensions between organizational privacy requirements and the need for demographic data with which to disaggregate performance and how many teams had little experience collecting demographic data in general, while others lacked specific expertise in collecting demographic data for their use cases or deployment contexts).

²⁴ Board of Governors of the Federal Reserve System, Proposed rule, Regulation B, 64 Fed. Reg. 44582, 44586, (Aug. 16, 1999), <https://www.govinfo.gov/content/pkg/FR-1999-08-16/pdf/99-20598.pdf>

²⁵ Id.

without an act of Congress, inference methodologies should be used to measure and detect disparities. DOJ CRT, in collaboration with civil rights agencies and NIST, should work to develop guidance or technical assistance detailing the circumstances when certain inference methods could be used, and how to use such methodologies as part of an anti-discrimination testing effort. For example, “methods to generate data on perceived race may be relevant to assess the impact of race in people’s interactions with one another, but not so much for understanding whether a product or system performs differently across self-identified races and ethnicities.”²⁶ When measuring disparities, “the choice of inference or racial proxy might be an important part of the analysis design. . . . [O]ne should have in mind what might be driving those disparities, or at least be willing to speculate and explore a range of potential causes.”²⁷

In addition to initiating processes to harmonize demographic data collection expectations across domains by lifting prohibitions, DOJ CRT should develop guidance regarding baseline guardrails that organizations and agencies should employ when obtaining and handling this data, whether directly or through inference methodologies. Guardrails should include, for example, expected privacy and data security practices such as limiting use of demographic data solely to bias testing, documentation articulating and providing justification for the selected data collection method(s), and procedural controls to limit access to sensitive data except when needed to conduct anti-discrimination testing or remediation.

5. DOJ CRT should hold monthly meetings to provide external stakeholders with ongoing updates about progress on implementing EO 14110 and organize regular convenings to share best practices for combatting algorithmic discrimination.

DOJ CRT should consider opportunities to engage with a diverse range of stakeholders, including civil rights organizations, consumer advocates, and members of impacted communities, regarding the implementation of EO 14110 on a monthly basis. During the development of the Blueprint for an AI Bill of Rights, the White House Office of Science & Technology Policy led a robust effort to engage with external stakeholders and address the

²⁶ Rachad Alao, Miranda Bogen, Jingang Miao, Ilya Mironov, Jonathan Tannen, “How Meta is working to assess fairness in relation to race in the U.S. across its products and systems,” (Nov. 2021), <https://ai.facebook.com/research/publications/how-meta-is-working-to-assess-fairness-in-relation-to-race-in-the-us-across-its-products-and-systems>.

²⁷ Aaron Rieke, Vincent Southerland, Dan Svirsky, Mingwei Hsu, *Imperfect Inferences: A Practical Assessment*, In Proceedings of the 2022 ACM Conference on Fairness, Accountability, and Transparency (2022), 767, 772 <https://dl.acm.org/doi/fullHtml/10.1145/3531146.3533140>.

needs of the communities most directly affected by algorithmic bias and discrimination.²⁸ This process could provide a template for DOJ CRT to conduct a similar engagement effort related to the implementation of EO 14110.

DOJ CRT should also host an annual workshop focused on the latest research and methodologies aimed at combating algorithmic discrimination, similar to the role the FTC's PrivacyCon plays for consumer privacy and data security.²⁹ Such a workshop or conference would provide a forum for experts, advocates, and government officials to share best practices and discuss emerging trends related to issues such as algorithmic auditing, transparency and explainability, and machine learning. A broad, interdisciplinary research community regularly contributes to the ACM Conference on Fairness, Accountability, and Transparency and the ACM Conference on Equity and Access in Algorithms, Mechanisms, and Optimization. A conference or workshop focused specifically on combating algorithmic discrimination could help civil rights enforcement agencies remain apprised of the latest research, methodologies, and individuals working in this area, and provide an important signal to researchers about government priorities, as well as opportunities and limitations in the applicability of their work for civil rights enforcement contexts.

Over many years, our organizations have been pushing to advance equity and justice in how technology shapes the core interests and opportunities of marginalized Americans. Throughout the Biden-Harris Administration, our organizations have provided a range of agencies with proposals for addressing discrimination arising from the use of new

²⁸ White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Listening to the American People*, (Oct. 4 2022),

<https://www.whitehouse.gov/ostp/ai-bill-of-rights/listening-to-the-american-people/>.

²⁹ Federal Trade Commission, PrivacyCon,

<https://www.ftc.gov/news-events/events/2024/03/privacycon-2024>.

technologies in covered civil rights areas.³⁰ Each proposal we offer in this letter is practical, grounded in existing authority, and directly responsive to Executive Order 14110's directives.³¹ We would be pleased to discuss the proposals in this memo in more detail in the weeks and months ahead. For any questions or further discussion, please contact Logan Koepke (Project Director, Upturn) at logan@upturn.org, Quinn Anex-Ries (Policy Associate, Lawyers' Committee for Civil Rights Under Law) at qanex-ries@lawyerscommittee.org, or Ridhi Shetty (Policy Counsel, Center for Democracy & Technology) at rshetty@cdt.org.

Sincerely,

American Civil Liberties Union
Center for Democracy & Technology
Consumer Reports
Electronic Privacy Information Center
Fight for the Future
Lawyers' Committee for Civil Rights Under Law
The Leadership Conference on Civil and Human Rights
NAACP Legal Defense and Educational Fund, Inc. (LDF)

³⁰ See, e.g., ACLU, Leadership Conference on Civil and Human Rights, Upturn, et al., "Re: Centering Civil Rights in Artificial Intelligence and Technology Policy," (Jul. 13, 2021), <https://www.upturn.org/static/files/2021-07-13%20Coalition%20Letter%20to%20OSTP%20on%20Centering%20Civil%20Rights%20in%20AI%20Policy.pdf>; Leadership Conference on Civil and Human Rights, et al., "Re: Next Steps to Advance Equity and Civil Rights in Artificial Intelligence and Technology Policy," (Jun. 13, 2023), <https://civilrightsdocs.info/pdf/policy/letters/2023/DPC-OSP-OMB-AI-Letter.pdf>; Center for American Progress, Center for Democracy & Technology, Leadership Conference on Civil and Human Rights, Letter to President Biden, (Aug. 3, 2023), <https://cdt.org/wp-content/uploads/2023/08/8-03-23-Letter-to-WH-on-AI-EO.pdf>; Upturn, et al., "Re: Advancing Anti-Discrimination Testing in an Artificial Intelligence Executive Order," (Aug. 7, 2023), <https://www.upturn.org/static/files/2023-08-07-Upturn-Letter-to-Biden-Harris-Administration-on-AI-E-O.pdf>.

³¹ Our recommendations are also consistent with the administration's policy, as expressed through Executive Orders 14091, as well as the AI Bill of Rights. Executive Order 14091 broadly required agencies to consider opportunities to "prevent and remedy discrimination, including by protecting the public from algorithmic discrimination." The AI Bill of Rights called for designers, developers, and deployers of automated systems to "take proactive and continuous measures to protect individuals and communities from algorithmic discrimination and to use and design systems in an equitable way," and for "proactive equity assessments as part of the system design," as well as "pre-deployment and ongoing disparity testing and mitigation." See Executive Order 14091, "Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," (Feb. 16, 2023), <https://www.federalregister.gov/documents/2023/02/22/2023-03779/further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal>; White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* at 3 (Oct. 4 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>.

National Urban League
Upturn

cc:

Chair Charlotte A. Burrows
Equal Employment Opportunity Commission

Director Rohit Chopra
Consumer Financial Protection Bureau

Secretary Marcia L. Fudge
Department of Housing and Urban Development

Chair Lina Khan
Federal Trade Commission

Acting Secretary Julie Su
Department of Labor

Director Sandra Thompson
Federal Housing Finance Agency

Secretary Miguel Cardona
Department of Education

Secretary Xavier Becerra
Department of Health and Human Services

Chair Jessica Rosenworcel
Federal Communications Commission