Upturn
Toward Justice in Technology

November 21, 2022

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

Submitted via regulations.gov

Re: Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security (Commercial Surveillance ANPR, R111004)

We write to provide comments in response to the Federal Trade Commission's Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security published on August 22, 2022.

Upturn is a non-profit organization that advances equity and justice in the design, governance, and use of technology. Through research and advocacy, we drive policy change by investigating specific ways that technology and automation shape people's opportunities, particularly in historically disadvantaged communities.

Our comments primarily address the numbered questions related to the collection and use of consumer data (40, 43), automated decision-making systems (53, 56-57, 59-60, 62, 64), discrimination based on protected categories (65-72), corporate disclosure (92), and obsolescence (95).

Upturn
Toward Justice in Technology

Executive Summary

Stuctural discrimination remains a prevalent cause of harm for many Americans, particularly Black and brown people, women, LGBTQ+ people, people with disabilities, and other historically disadvantaged communities. When companies discriminate, whether intentionally or not, consumers can be unfairly hampered in their pursuit of basic services and economic opportunities, such as stable housing, quality jobs, and financial security.

The harms of structural discrimination have been amplified by algorithmic and other data-driven technologies. Civil rights laws that once offered stronger protection against discrimination have not kept pace with changing technology, so new legal and regulatory approaches are needed to protect consumers and to fill gaps.

We believe the Federal Trade Commission (FTC) must use rulemaking to address commercial practices that cause discrimination. It can do so by prescribing a rule that applies its unfairness authority directly to discriminatory practices, which often easily satisfy the three-factor unfairness test. The FTC is well justified in pursuing such a rule, and existing civil rights laws and practices should inform its approach.

I. The FTC must address commercial practices that cause discrimination, whether or not algorithms are involved.

A. Structural discrimination remains prevalant, even as commercial practices, technologies, and industries have changed.

Discrimination and the effects of discrimination still define significant portions of American life. Despite decades of varied attempts to root out and redress discrimination, discrimination still defines how Black and brown people, women, LGBTQ+ people, people with disabilities, and other historically disadvantaged people can access basic goods and services, seek economic opportunities, and pursue safe and healthy lives.

For example, since the 1970s, the median household income for Black and Hispanic workers has significantly trailed that of white households. In 2020, Black and Hispanic median household income was roughly $46,000 and $55,000, respectively, while white households made $75,000.[1] Across race and ethnicity, women earn less than men.[2] In 2019, the median white family had $184,000 in familial wealth, whereas the median Black and Hispanic family had $23,000 and $38,000, respectively.[3]

In addition, Black renters have evictions filed against them at twice the rate of white renters — and Black women are more likely to be subject to illegitimate eviction filings, and most likely to be further denied future housing due to those filings.[4] In 2020, Black borrowers had double the mortgage application denial rate of their white counterparts.[5]

Rates of discrimination in hiring have also persisted over time, particularly racial discrimination.[6] Women are more likely to occupy low-wage occupations, making up two-thirds of the low-wage workforce.[7] Only 19.1% of people with a disability were employed in 2021 compared to 63.7% of those without a disability.[8] In large part due to occupational segregation, people with disabilities make 66 cents for every dollar that people without disabilities earn.[9] LGBTQ+ people also experience a wage gap, making 89

---

[1] U.S. Census Bureau, Current Population Survey, 1968 to 2021, Annual Social and Economic Supplements, Real Median Household Income by race and Hispanic Origin: 1967 to 2020, *available at* https://www.census.gov/content/dam/Census/library/visualizations/2021/demo/p60-273/figure2.pdf.

[2] U.S. Department of Labor, Median annual earnings by sex, race and Hispanic ethnicity, *available at* https://www.dol.gov/agencies/wb/data/earnings/median-annual-sex-race-hispanic-ethnicity.

[3] Ana Hernández Kent, Lowell R. Ricketts, "Has Wealth Inequality in America Changed over Time? Here Are Key Statistics," Federal Reserve Bank of St. Louis, Dec. 02, 2020, *available at* https://www.stlouisfed.org/open-vault/2020/december/has-wealth-inequality-changed-over-time-key-statistics.

[4] Sophie Beiers, Sandra Park, Linda Morris, "Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color," ACLU, Jan. 10, 2020, *available at* https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color.

[5] Jung Hyun Choi, Peter J. Mattingly, "What Different Denial Rates Can Tell Us About Racial Disparities in the Mortgage Market," Urban Institute, Jan. 13, 2022, *available at* https://www.urban.org/urban-wire/what-different-denial-rates-can-tell-us-about-racial-disparities-mortgage-market ("According to the most recent Home Mortgage Disclosure Act (HMDA) data, 16.1 percent of all mortgage applications in 2020 were denied. Of those denials, Black borrowers had the highest denial rate (27.1 percent), whereas white borrowers had the lowest (13.6 percent).").

[6] Lincoln Quillian, Devah Pager, Ole Hexel, Arnfinn H. Midtbøen, *Meta-analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, Proceedings of the National Academy of Sciences 114, no. 41 (2017): 10870-10875, *available at* https://www.pnas.org/doi/10.1073/pnas.1706255114.

[7] Joan Entmacher, Lauren Frohlich, Katherine Gallagher Robbins, Emily Martin, Liz Watson, *Underpaid & Overloaded: Women in Low-Wage Jobs*, National Women's Law Center, 2014, *available at* https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_lowwagereport2014.pdf.

[8] U.S. Bureau of Labor Statistics, "9.1 percent of people with a disability were employed in 2021," The Economics Daily, Mar. 01, 2022, *available at* https://www.bls.gov/opub/ted/2022/19-1-percent-of-people-with-a-disability-were-employed-in-2021.htm.

[9] Jennifer Cheeseman Day, Danielle Taylor, "Do People With Disabilities Earn Equal Pay? In Most Occupations, Workers With or Without Disabilities Earn About the Same," U.S. Census Bureau, Mar. 21, 2019, *available at* https://www.census.gov/library/stories/2019/03/do-people-with-disabilities-earn-equal-pay.html#:~:text=In%20nearly%20every%20occupation%2C%20workers,those%20with%20no%20disability%20earn.

cents for every dollar earned by non-LGBTQ+ workers. This wage gap is worse for LGBTQ+ women, people of color, and transgender people.[10]

Furthermore, people with disabilities typically have less access to healthcare.[11] Similarly, members of the LGBTQ+ community have less access to healthcare and are more likely to have worse health outcomes than their heterosexual, cisgender counterparts.[12]

Historically, a range of explicitly discriminatory federal, state, and local government policies ensured that Black and brown people, women, LGBTQ+ people, and people with disabilities were categorically denied equal protection under the law. The practice of redlining deliberately excluded predominantly Black communities from economic opportunities and perpetuated residential segregation. Residential segregation has served as the basis for community disinvestment which has resulted in disparities in wealth, health, education, and employment. Furthermore, prior to the Equal Pay Act, the Americans with Disabilities Act, and the Civil Rights Act, very few legal protections existed for women, LGBTQ+ people, and people with disabilities. As a result, disparities in important life opportunities were created that still persist despite greater legal protections.

Today, a range of government policies, corporate practices, and other forces continue to "perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups."[13]

B. Algorithmic systems expand and exacerbate structural discrimination.

Powerful institutions now use a variety of automated, data-driven technologies to shape key decisions about people's lives. These technologies can both expand and exacerbate historical racial and economic disparities in housing, employment, public benefits, education, the criminal legal system, healthcare, and other areas of opportunity and wellbeing. Across these areas, technologies are often used to make decisions that

[10] Human Rights Campaign, "The Wage Gap Among LGBTQ+ Workers in the United States," *available at* https://www.hrc.org/resources/the-wage-gap-among-lgbtq-workers-in-the-united-states.
[11] Center for Disease Control and Prevention, "What is Health Equity?" available at https://www.cdc.gov/ncbddd/humandevelopment/health-equity.html#:~:text=Data%20from%202019%20shows%2C%20compared,and%20are%20less%20physically%20active.
[12] Human Rights Watch, "'You Don't Want Second Best': Anti-LGBT Discrimination in US Health Care," July 2018, *available at* https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care.
[13] Exec Order 13985 86 Fed. Reg. 7009, Jan. 20, 2021.

substantially affect people's material conditions, especially in the absence of government attention and regulation.

In housing, algorithmic systems drive, exacerbate, and obscure decisions about rentals, appraisals, mortgages, and online advertising audiences. For example, the algorithms that banks use to approve or deny mortgage loans have been shown to disproportionately reject applicants who are people of color.[14] Relative to similarly positioned white applicants, Latinx applicants are 40% more likely to be rejected and Black applicants are 80% more likely to be rejected.[15] Such disparities keep minorities from being homeowners. But even when a mortgage is approved, homeowners of color face further discriminatory hurdles. For example, some financial technology companies use algorithms in their underwriting process and charge Black and Latinx borrowers 5.4 to 7.7 basis points more for mortgage loans than similarly situated white borrowers.[16] As a result, Black and Latinx borrowers annually pay $450 million more in interest for home loans.[17]

Algorithmic systems also carry forward the legacy of historic policies and practices that segregated, devalued, and disinvested from communities of color. For example, cities such as Detroit and Indianapolis use market value assessment algorithms to determine the "market strength" of a neighborhood and inform investment strategies such as subsidies, tax breaks, transit upgrades, and code enforcement.[18] Consequently, already disadvantaged neighborhoods with lower homeownership rates, average home prices, and higher foreclosure rates are marked for disinvestment by such algorithms.[19] Similarly, automated valuation models[20] used by real estate agents, brokers, and mortgage lenders to supplement or supplant in-person appraisals have been shown to produce larger errors in

---

[14] Emmanuel Martinez, Lauren Kirchner, "The Secret Bias Hidden in Mortgage-Approval Algorithms," The Markup, Aug. 25, 2021, *available at* https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms.
[15] *Id.*
[16] Robert Bartlett, Adair Morse, Richard Stanton, Nancy Wallace, *Consumer-lending Discrimination in the FinTech Era*, 143 Jour. of Fin. Econ. 1, 30-56 (2022), *available at* https://www.sciencedirect.com/science/article/abs/pii/S0304405X21002403.
[17] *Id.*
[18] Sara Safransky, "Geographies of Algorithmic Violence: Redlining the Smart City," International Journal of Urban and Regional Research, Nov. 24, 2019, 9, *available at* https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2427.12833.
[19] *Id.* at 10.
[20] Automated valuations models are defined in 12 U.S.C. § 3354(d) as "any computerized model used by mortgage originators and secondary market issuers to determine the collateral worth of a mortgage secured by a consumer's principal dwelling."

majority Black neighborhoods than in white neighborhoods.[21] As part of the Interagency Task Force on Property Appraisal and Valuation Equity, financial regulators committed to "address potential bias by including a nondiscrimination quality control standard in the proposed [automated valuation model] rule."[22]

Beyond homeownership, algorithmic systems used for rental decisions continue to harm marginalized communities and block access to housing. Algorithmic systems mediate what housing opportunities renters are aware of in the first place. For example, until recently, large ad platforms like Meta allowed advertisers to exclude protected classes from their target audience (though this is no longer the case).[23] Worse, and more importantly, Meta's ad delivery algorithm has been empirically shown to lead to significant demographic skews on the basis of protected factors, even when an advertiser chooses to broadly target their ad.[24] Critically, Meta itself has acknowledged the potential for discriminatory effects arising from its ad delivery decisions.[25] Furthermore, algorithms used in the tenant screening process have been shown to perpetuate discrimination in part due to their reliance on criminal, credit, and eviction records. In an ongoing case, a woman was denied tenancy because a tenant screening report included a dismissed shoplifting charge for her son.[26] Because arrest, criminal, and eviction records are already racially biased, algorithms that use such information to make housing decisions further harm marginalized communities and lock people out of housing.

Similar to housing, algorithmic systems used in credit tend to replicate and exacerbate historically racist practices. For example, FICO, the predominant credit scoring algorithm used as the basis for over 90% of lending decisions, positively weighs factors

---

[21] Michael Neal, Sarah Strochak, Linna Zhu, and Caitlin Young, *How Automated Valuation Models Can Disproportionately Affect Majority Black Neighborhoods*, Urban Institute, Dec. 2020, *available at* https://www.urban.org/sites/default/files/publication/103429/how-automated-valuation-models-can-disproportionately-affect-majority-black-neighborhoods_1.pdf.

[22] Interagency Task Force on Property Appraisal and Valuation Equity, *Action Plan to Advance Property Appraisal and Valuation Equity Closing the Racial Wealth Gap by Addressing Mis-valuations for Families and Communities of Color*, Mar. 2022, 27, *available at* https://pave.hud.gov/sites/pave.hud.gov/files/documents/PAVEActionPlan.pdf.

[23] Julia Angwin, Ariana Tobin, Madeleine Varner, "Facebook (Still) Letting Housing Advertisers Exclude Users by Race," ProPublica, Nov. 21, 2017, *available at* https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin.

[24] *Id.*

[25] Settlement Agreement and Release, Exhibit A – Programmatic Relief, *National Fair Housing Alliance, et al., v. Facebook, Inc.*, No. 18-cv-02689-JGK (S.D.N.Y. Mar. 8, 2019), Doc. 67-2, https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-Exhibit-A-3-18.pdf. *See also* DOJ Settlement ("Meta will develop a system to reduce variances in Ad Impressions between Eligible Audiences and Actual Audiences, which the United States alleges are introduced by Meta's ad delivery system, for sex and estimated race/ethnicity").

[26] *Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Solutions, LLC*, 369 F. Supp. 3d 362 (D. Conn. 2019).

Upturn
Toward Justice in Technology

like mortgage payments while excluding rental payment history.[27] This systematically disadvantages Black, Latinx, and Native American consumers who have historically had less access to homeownership and traditional credit than white consumers. In addition, credit determinations for minority and low-income borrowers tend to be less accurate than those for white borrowers.[28] Because marginalized communities have historically had less access to credit, algorithms that predict credit risk are less accurate for minority borrowers because there is less data to inform the risk prediction.[29] These inaccuracies perpetuate racial biases within lending practices.

Financial technology companies that rely on newer algorithmic systems — as well as new or alternative data — to make lending decisions are not immune from replicating these longstanding problems.[30] For example, one lender's platform relies on machine learning models and non-traditional applicant data, including data related to borrowers' higher education, to underwrite and price consumer loans.[31] Their machine learning models have been shown to penalize loan applicants based on the average SAT and ACT scores of the colleges that they attended, which research shows are not correlated with academic merit or success but are instead correlated with race and socioeconomic status.[32] A monitorship assessment of this model found adverse approval and denial disparities at the final stage of the loan process for Black applicants.[33]

Algorithmic systems also impact people's ability to navigate the job hiring process on equal footing. Bias is apparent in every step of the hiring process, including who learns of a job in the first place. For example, the same problems with Meta's ad delivery algorithms described above persist for employers affirmatively trying to reach a broad target audience. Even when a job posting is seen by a diverse audience, resume screening algorithms can lead to further discriminatory outcomes. In a now-defunct recruiting algorithm developed by Amazon, resumes were screened with a bias against women. This

---

[27] Emmanuel Martinez, Lauren Kirchner, "The Secret Bias Hidden in Mortgage-Approval Algorithms," The Markup, Aug. 25, 2021, *available at* https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms.
[28] *Id.*
[29] *Id.*
[30] Upturn, *Knowing the Score: New Data, Underwriting, and Marketing in the Consumer Credit Marketplace*, Oct. 19, 2014, *available at* https://www.upturn.org/static/files/Knowing_the_Score_Oct_2014_v1_1.pdf.
[31] Relman Colfax PLLC, Fair Lending Monitorship of Upstart Network's Lending Model, Initial Report of the Independent Monitor, Apr. 14, 2021, 3, *available at* https://www.relmanlaw.com/media/cases/1088_Upstart%20Initial%20Report%20-%20Final.pdf.
[32] *Id.* at 22-23.
[33] Relman Colfax PLLC, Fair Lending Monitorship of Upstart Network's Lending Model, *Second Public Report of the Independent Monitor*, Nov. 10, 2021, 17, *available at* https://www.relmanlaw.com/media/cases/1180_PUBLIC%20Upstart%20Monitorship_2nd%20Report_FINAL.pdf.

occurred because the training data was a function of resumes submitted to Amazon over a 10-year period, which were predominantly submitted by men. As a result, the algorithm learned to downgrade resumes that mentioned the word "women's" or the names of women's colleges.[34] Had the algorithm been deployed it would have perpetuated existing gender disparities at Amazon and excluded qualified women from jobs. Similarly, a separate algorithm created by a resume-screening company gave disproportionate weight to resumes that contained the name Jared and mentioned playing high school lacrosse as predictors for job performance.[35] Had that algorithm been implemented without being audited first, it would have disproportionately screened out women and poor people of color.[36]

Other algorithmic systems used in the hiring process also display bias against marginalized communities. For example, major employers such as CVS, Amazon, and Walmart use personality tests to determine the future success of applicants.[37] Personality tests tend to produce results based on a "norm" that is informed by the ethnic majority and able-bodied people.[38] As such, automated hiring systems are more likely to screen out applicants that are disabled.[39] Applicants that are able to avoid being screened out based on resumes or personality tests still face bias in the interview process. In a product no longer offered by HireVue, employers were able to use facial analysis technology and conduct automated interviews.[40] The interview AI evaluated applicants based on gestures, mannerisms, tone of voice, and cadence, making up 29% of their "employability score."[41] The use of this type of AI in the interview process would disproportionately harm people with disabilities who may have atypical speech patterns, movements, and facial actions.[42]

Beyond the traditional civil rights areas of credit, employment, and housing, algorithmic systems routinely shape healthcare decisions and outcomes. Many

[34] Jeffrey Dastin, "Amazon scraps secret AI recruiting tool that showed bias against women," Reuters, Oct. 10, 2018, *available at* https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.
[35] Dave Gershgorn, "Companies are on the hook if their hiring algorithms are biased," Quartz, Oct. 22, 2018, *available at* https://qz.com/1427621/companies-are-on-the-hook-if-their-hiring-algorithms-are-biased/.
[36] *Id.*
[37] Aaron Rieke, Urmila Janardan, Mingwei Hsu, Natasha Duarte, *Essential Work: Analyzing the Hiring Technologies of Large Hourly Employers*, Upturn, May 2021, 15, *available at* https://www.upturn.org/static/reports/2021/essential-work/files/upturn-essential-work.pdf.
[38] *Id.* at 26.
[39] *Id.*
[40] Lauren Weber, Elizabeth Dwoskin, "Are Workplace Personality Tests Fair?," The Wall Street Journal, Sep. 29, 2014, *available at* https://www.wsj.com/articles/are-workplace-personality-tests-fair-1412044257.
[41] *Id.*
[42] *Id.*

algorithmic systems have been developed to help determine when and how much care should be allocated. Frequently, use of these systems leads to disparities in healthcare quality, delivery, and outcomes.[43] One healthcare algorithm (that is representative of a family of risk prediction tools) that affects nearly 200 million people annually was shown to exhibit significant racial bias.[44] Instead of using illness, the algorithm relied on the cost of each patient's past medical care to predict future medical needs, and recommended early interventions for the patients deemed most at risk. Because Black patients historically have had less access to medical care, and as a result have generated less costs than white patients with similar illness and need, the algorithm wrongfully recommended that white patients receive more care than Black patients. In order to be identified for the same care, Black patients effectively had to be sicker than their white counterparts.[45] Similarly, an algorithm that measures kidney function that is used to determine a patient's placement on the waiting list for a kidney transplant led to kidney transplant inequities for Black patients.[46] The inclusion of race in the algorithm was intended to correct a previous error that led to overdiagnosing Black patients but ultimately resulted in underdiagnosing Black patients. As a consequence, Black patients were less likely to receive the appropriate care, including life-saving kidney transplants.[47]

Beyond healthcare algorithms that direct the type or level of care patients receive, algorithmic systems used as diagnostics have also been shown to lead to discriminatory outcomes. For example, an algorithm called CheXNet used to diagnose pneumonia and other lung diseases was predominately trained on data that consisted of male chest x-rays.

[43] Recognizing these problems, the Department of Health and Human Services recently promulgated its own proposed rulemaking that states that a "covered entity must not discriminate against any individual on the basis of race, color, national origin, sex, age, or disability through the use of clinical algorithms in its decision-making." *See* Department of Health and Human Services, Proposed Rule re: Nondiscrimination in Health Programs and Activities, 87 FR 47824, Aug. 4, 2022, *available at* https://www.federalregister.gov/documents/2022/08/04/2022-16217/nondiscrimination-in-health-programs-and-activities.
[44] Ziad Obermeyer, Brian Powers, Christine Vogeli, Sendhil Mullainathan, "Dissecting racial bias in an algorithm used to manage the health of populations," 366 Science, Oct. 25, 2019, 1, *available at* https://www.science.org/doi/10.1126/science.aax2342.
[45] *Id.* at 4.
[46] Rae Ellen Bichell, Cara Anthony, "For Black kidney patients, an algorithm may help perpetuate harmful racial disparities," Washington Post, June 8, 2021, *available at* https://www.washingtonpost.com/health/black-kidney-patients-racial-health-disparities/2021/06/04/7752b492-c3a7-11eb-9a8d-f95d7724967c_story.html.
[47] L. Ebony Boulware, Tanjala S. Purnell, Dinushika Mohottige, "Systemic Kidney Transplant Inequities for Black Individuals: Examining the Contribution of Racialized Kidney Function Estimating Equations," Jama Network, Jan. 14, 2021, 1, *available at* https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2775070.

Consequently, the algorithm failed to reliably diagnose women which would have led to significant disparities in lung treatment had the algorithm been implemented.[48]

These are just a few ways that algorithmic systems have created, exacerbated, or obscured discrimination. The White House's *Blueprint for an AI Bill of Rights* documents a number of other instances.[49] And of course, these are just publicly known examples of ways by which algorithmic systems contribute to discrimination: many more instances of discrimination exist but have not been investigated, audited, or tested by government agencies, researchers, advocates, and journalists. Without focused attention, technology will reinforce racial, economic, and social injustices found everywhere in our society.

C. "Algorithmic discrimination" is not new.

While the term "algorithmic discrimination" may be relatively new,[50] the technologies, practices, and harms in question often are not. In many of the examples above, the algorithmic and other data-driven technologies that exacerbate racial, gender, disability, and other forms of discrimination were developed decades ago.[51] An earlier generation of statistical models preceded the more complex tools that rely on machine learning and other newer techniques in use today. But even as techniques evolve, the underlying problems and material harms remain the same and continue to this day.

The Commission should use the term "algorithmic discrimination" carefully. The terminology may cause some to believe that these are new problems. Part of the misperception may stem from the fact that discrimination is typically framed in legal terms (disparate treatment or disparate impact), in contextual terms (describing the context in which discrimination occurs, such as housing discrimination, employment discrimination, or credit discrimination), or in reference to a protected class (such as race discrimination, disability discrimination, or sexual orientation discrimination). Rarely is discrimination framed in such a way that centers a specific technology or practice that

---

[48] Agostina J. Larrazabal, Nicolás Nieto, Victoria Peterson, Diego H. Milone, Enzo Ferrante, "Gender imbalance in medical imaging datasets produces biased classifiers for computer-aided diagnosis," Proceedings of the National Academy of Sciences, Jun. 9, 2020, 2, *available at* https://www.pnas.org/content/117/23/12592.

[49] White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, October 2022, 3, *available at* https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

[50] Google Books Ngram Viewer, Results for "algorithmic discrimination," *available at* https://books.google.com/ngrams/graph?content=algorithmic+discrimination&year_start=1980&year_end=2019&corpus=26&smoothing=3# .

[51] As further examples, statistical risk assessment tools that states are adopting today for pretrial release decisions date back to at least the 1990s. Consumer credit scoring algorithms, like FICO, emerged in the 1980s.

causes discriminatory outcomes.

The term "algorithmic discrimination" may also invite policymakers, regulators, and the public to misunderstand the nature and scope of the problem. Some may approach "algorithmic discrimination" narrowly as only a technical or statistical problem. Similarly, the label may cause some to misunderstand the problem as one that humans have little agency over, despite the fact that building an algorithmic system requires significant human labor and discretion at each stage. These stages include problem definition, data collection and labeling, model selection and training, data partitioning, and deployment.[52] Without careful human attention and oversight, algorithmic models can easily inherit biases against protected classes, even when protected class attributes are not considered.[53] As a recent National Institute of Standards and Technology special publication notes, algorithmic systems are:

> neither built nor deployed in a vacuum, sealed off from societal realities of discrimination or unfair practices. Understanding [these systems] as a socio-technical system acknowledges that the processes used to develop technology are more than their mathematical and computational constructs . . . [and] takes into account the values and behavior modeled from the datasets, the humans who interact with them, and the complex organizational factors that go into their commission, design, development, and ultimate deployment.[54]

Ultimately, the Commission's rulemaking must be rooted in an effort to protect people's fundamental rights and opportunities as powerful institutions continue to use data-driven technologies to shape key decisions about people's lives.

D. Civil rights laws have not kept pace with technological change.

[52] David Lehr, Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. Davis L. Rev. 653 (2017) (observing that machine-learned systems "are the complicated outputs of intense human labor — labor from data scientists, statisticians, analysts, and computer programmers. From the moment these humans conceptualize a predictive task to the moment the running model is deployed, they exert significant and articulable influence over everything from how the data are cleaned to how simple or complex the algorithm's learning process is. Along the way, they have the power to affect the running model's accuracy, explainability, and discrimination.").
[53] *See, e.g.*, Anupam Datta et al., *Proxy Discrimination in Data Driven Systems*, (arXiv:1707.08120, 2017), 1.
[54] Reva Schwartz, Apostol Vassilev, Kristen Greene, Lori Perine, Andrew Burt, Patrick Hall, *Towards a Standard for Identifying and Managing Bias in Artificial Intelligence*, National Institute of Standards and Technology, U.S. Department of Commerce, NIST Special Publication 1270, 3, *available at* https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf.

Upturn
Toward Justice in Technology

Though technologies new and old routinely mediate access to opportunity in traditionally covered civil rights areas like housing, employment, and credit, longstanding civil rights protections and antidiscrimination laws have not kept pace with technological change. As Commissioner Slaughter observed, "[c]ivil rights laws are the logical starting point for addressing discriminatory consequences of algorithmic decision-making, [but] in many cases, existing civil-rights jurisprudence may be difficult to apply to algorithmic bias. . . . So, we must consider what other legal protections currently exist outside of direct civil rights statutes."[55]

FTC intervention is necessary due to three significant gaps in existing civil rights law.

i. First, civil rights laws often do not cover all of the relevant companies that play a role in discrimination.

Consider Title VII, which applies to employers, employment agencies, labor organizations, or joint labor-management committees. This list does not encompass all of the relevant entities that shape hiring outcomes today.[56] Hiring is rarely a single decision, but rather a series of decisions that culminates in a job offer or rejection.[57] Those decision points include sourcing, screening, interviewing, selection, and evaluation.[58] Numerous vendors sell a wide range of technology products and services to help employers at each stage of the hiring process. But few are covered under Title VII.

Take pre-employment assessments as an example. Today, many vendors sell pre-employment assessments that purport to measure aptitude or cognitive ability, personality traits, skills, and cultural fit to differentiate applicants.[59] Civil rights law does have *something* to say about these tests. For example, the Americans with Disabilities Act

---

[55] Rebecca Kelly Slaughter, Janice Kopec, Mohamad Batal, *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission*, 23 Yale J.L. & Tech 1, 38 (2021), *available at* https://law.yale.edu/sites/default/files/area/center/isp/documents/algorithms_and_economic_justice_master_final.pdf.
[56] Aaron Rieke, Miranda Bogen, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, Upturn, Dec. 2018, *available at* https://www.upturn.org/static/reports/2018/hiring-algorithms/files/Upturn%20--%20Help%20Wanted%20-%20An%20Exploration%20of%20Hiring%20Algorithms,%20Equity%20and%20Bias.pdf.
[57] *Id.* at 13.
[58] *Id.*
[59] *See, e.g.,* Manish Raghavan, Solon Barocas, Jon Kleinberg, and Karen Levy, *Mitigating Bias in Algorithmic Hiring: Evaluating Claims and Practices*, In Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency, 2020, 469–481, *available at* https://doi.org/10.1145/3351095.3372828. (Discussing the various choices vendors make regarding data collection and prediction targets, and exploring the risks and trade-offs that these choices pose.).

— which covers the same entities as Title VII — prohibits hiring practices that screen out or tend to screen out qualified applicants on the basis of disability.[60] But though the ADA and Title VII cover an *employer's* use of a pre-employment assessment that screens out individuals based on a protected class, neither law has anything to say about the *vendor* who developed and sold the pre-employment assessment. And unlike some state laws, federal law does not contain a more general prohibition regarding systems or actors that facilitate employment discrimination.[61]

The use of vendor tools also presents further hurdles for plaintiffs (who already face significant legal obstacles) as they seek to hold employers accountable for a discriminatory practice. Litigation often fails because courts expect plaintiffs' prima facie cases to include statistical evidence of discrimination that most plaintiffs have no good way of obtaining.[62] When an employer uses a variety of proprietary vendor tools in its hiring process, obtaining such evidence becomes even more unlikely.

Moreover, people who are discriminated against may have no clue how an automated or standardized process was used to make a life-altering decision about them. For example, Upturn recently submitted online applications to 15 large, hourly employers in the Washington, D.C. metro area in order to track the technologies that applicants for low-wage hourly jobs encounter each day. We came across a variety of pre-employment assessments, including personality tests. But we couldn't determine whether employers were using the scores on those assessments to rank candidates, or whether they were rejecting all candidates below a certain score. We were asked to provide our availability and pay preferences, but we couldn't tell whether we were disqualified based on our stated salary preference. We also often couldn't tell when and whether an employer was using a tool built by a third-party vendor.

[60] Aaron Rieke, Urmila Janardan, Mingwei Hsu, Natasha Duarte, *Essential Work: Analyzing the Hiring Technologies of Large Hourly Employers,* Upturn, May 2021, 32, *available at* https://www.upturn.org/static/reports/2021/essential-work/files/upturn-essential-work.pdf; *see also* 42 U.S.C. § 2000e–2(k)(1)(A)(i)-(ii).
[61] *See* Amit Datta, Anupam Datta, Jael Makagon, Deirdre K. Mulligan, Michael Carl Tschantz, *Discrimination in Online Advertising: A Multidisciplinary Inquiry*, 81 Proceedings of Machine Learning Research 1, 9, 2018, *available at* http://proceedings.mlr.press/v81/datta18a/datta18a.pdf. ("California, New York and Pennsylvania, prohibit any person from aiding, abetting, inciting, compelling, or coercing discriminatory employment practices.").
[62] For example, though the EEOC has said that national statistics support a finding that excluding job candidates based on criminal records will have a racially disparate impact, plaintiffs relying on national statistics to challenge employment background checks have been dismissed for failing to show disparate impact statistics on the specific applicant pool for the job. *Mandala v. NTT Data, Inc.*, 975 F.3d 202 (2d Cir. 2020).

Upturn
Toward Justice in Technology

Even when a plaintiff does manage to overcome these challenges and succeeds in a discrimination claim, the scope of remedies are quite narrow and only applicable to the one employer at issue — even though dozens more may use the same pre-employment assessment that will more than likely have the same disparate impact.

Similar problems exist in other civil rights laws. For example, the Equal Credit Opportunity Act's list of covered entities is limited to creditors. Creditors are defined as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit."[63] But that definition does not appear to apply to entities that provide data informing credit decisions, such as vendors of credit scores. Though Regulation B indicates that "creditor[s] may use an empirically derived, demonstrably and statistically sound, credit scoring system obtained from another person"[64] — and details the requirements for a system to qualify as such[65] — vendors of credit scores may still escape scrutiny.

As these cases show, civil rights laws often do not reach all relevant entities. But even when a civil rights law does expressly encompass specific entities, it can still be unclear if a particular company is covered. For example, Title VII applies to "employment agencies." Employment agencies are defined as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person."[66] Though EEOC guidance exists, it is three decades old.[67] And as one scholar notes, "[t]here are relatively few cases interpreting the boundaries of this definition, perhaps because in the decades immediately following the passage of Title VII, it seemed obvious what an employment agency was."[68]

Today, it's not so obvious. Online platforms like Indeed, LinkedIn, Meta, and ZipRecruiter play a significant role in shaping what employment opportunities users do or do not see, but whether they qualify as employment agencies is not always clear.[69] For

[63] 15 U.S.C. § 1691a(f).
[64] 12 C.F.R. 1002 (p)(2).
[65] 12 C.F.R. 10002 (p)(1).
[66] 42 U.S. Code § 2000e(c).
[67] U.S. Equal Employment Opportunity Commission, OLC Control Number EEOC-CVG-1990-7, CM-631: Employment Agencies, Feb. 15, 1990, *available at* https://www.eeoc.gov/laws/guidance/cm-631-employment-agencies.
[68] Pauline T. Kim, *Manipulating Opportunity*, 106 Va. L. Rev. 867 (2020).
[69] *Id.* at 914 ("Under existing case law, tech intermediaries in the labor market may satisfy the definition of an employment agency, depending upon the details of their operation.").

example, some platforms operate as simple job boards; some platforms use recommender systems to select, rank, and present talent pools to recruiters and hiring managers; other platforms use similar systems to recommend employers to potential applicants; and still other platforms deliver job advertisements to specific users based on the platform's predictions about what kinds of users are most likely to engage with that ad.

Efforts to hold online platforms like Meta or LinkedIn responsible for their discriminatory effects will also likely encounter challenges based on Section 230 of the Communications Decency Act.[70] At the heart of Section 230 is the principle that internet intermediaries should not absorb liability for unlawful content created entirely by another. This principle has been upheld even when an intermediary's algorithms play a role in steering its users toward unlawful content.[71]

Platforms like Meta have argued that "Facebook's use of an algorithm to make decisions about which third-party content to show to which users is a protected function under" Section 230.[72] But, as Upturn has argued:

> an algorithm is just a step-by-step procedure to accomplish some end. Everything an interactive computer service does — whether innocuous or abhorrent — is effectuated by algorithms. An ad delivery business could choose to deliver all insurance ads to male users, completely withholding such ads from women, simply by altering a few characters of computer code. Affording such conduct immunity merely because it is codified in an algorithm threatens any attempt to address discriminatory conduct online.[73]

What truly matters is a platform's underlying conduct — for example, potential steering of job or housing ads away from protected groups. Concerns about Section 230's reach should not impede the Commission's exploration of rulemaking in this area.

---

[70] 47 U.S.C. § 230.
[71] *Dyroff v. Ultimate Software Group, Inc.*, Case No. 17-cv05259-LB, 14 (N.D. Cal. Nov. 26, 2017) (Finding that the defendant is "not an 'information content provider' merely because its content-neutral tools (such as its algorithms and push notifications) steer users to unlawful content.").
[72] *Liapes v. Facebook, Inc.*, Case No. 20-CIV-01712 (Cal. Sup. San Mateo 2020), Facebook, Inc.'s Demurrer to First Amended Complaint, at 31.
[73] *Liapes v. Facebook, Inc.*, Case No. 20-CIV-01712 (Cal. Sup. San Mateo 2020), Brief of Amicus Curiae Upturn, Inc., at 11.

ii. Second, many discriminatory harms fall outside the bounds of existing civil rights laws.

Beyond the major civil rights areas of credit, employment, and housing, commercial algorithms can cause many other forms of important discriminatory harms that fall outside the bounds of existing civil rights laws.

As an illustrative example, consider the pervasive use of automated speech recognition systems, which use machine learning algorithms to convert speech into written text — such as voice assistants in cellphones, or automatic translation and captioning tools. A recent study showed that automated speech recognition tools regularly "exhibited substantial racial disparities."[74] In that study, of the five speech recognition systems tested, all had error rates that were twice as high for Black users than white users.[75] Other studies of automated speech recognition services have found "significant disparities in performance between those whose first language is English and those whose first language is not English,"[76] and that the systems "do considerably worse for non-American accents."[77]

Traditional civil rights laws would not have much to say about this issue. The problem is not that products that use automated speech recognition systems do not work; the problem is that these products do not work equally well for white and non-white consumers, failing in a discriminatory manner.

iii. Third, existing civil rights laws do not require comprehensive, affirmative steps to measure and redress algorithmic discrimination.

These steps include proactive demographic measurement to understand and address discrimination, either using carefully collected demographic data or inference tools, as well as affirmative, ongoing testing and exploration for less discriminatory alternatives.

[74] Allison Koenecke, Andrew Nam, Emily Lake, Joe Nudell, Minnie Quartey, Zion Mengesha, Connor Toups, John R. Rickford, Dan Jurafsky, Sharad Goel, *Racial Disparities in Automated Speech Recognition*, Proceedings of the National Academy of Sciences 117, no. 14 (Apr. 7, 2020).
[75] *Id.*
[76] Alex DiChristofano, Henry Shuster, Shefali Chandra, Neal Patwari, *Performance Disparities Between Accents in Automatic Speech Recognition*, Aug. 1, 2022 *available at* https://arxiv.org/abs/2208.01157.
[77] Divya Tadimeti, Kallirroi Georgila, David Traum, *Evaluation of Off-the-shelf Speech Recognizers on Different Accents in a Dialogue Domain*, Proceedings of the 13th Conference on Language Resources and Evaluation, 6001-6008 (2020).

Demographic testing has historically played an important — and in some cases, legally mandated — role in rooting out discrimination.[78] For example, fair housing testers investigate whether landlords treat potential tenants differently based on their race or source of income.[79] Mortgage lenders are required to collect demographic data from borrowers and analyze their lending practices for disparities.[80] Regulation B makes an exception to its general prohibition on collection of sensitive attribute data for some *voluntary* collection as "monitoring information" in instances where lenders conduct self-testing.[81] Many employers are required to ask job applicants and employees to answer voluntary demographic questions and to submit reports to government agencies on the aggregate demographic makeup of their workforce, broken down by race and gender categories.[82] But outside of limited domains such as employment, healthcare, and (occasionally) financial services, demographic labels, such as those for race and gender, are often unavailable in relevant datasets. Across industries, many practitioners are hesitant to collect demographic data, and there is little clear guidance on the topic.[83]

In recent years, partially in response to pressure from civil rights groups, some technology firms have begun to acknowledge the need to collect or infer demographic data to test products and algorithms for discriminatory impacts.[84] As Upturn has argued,

---

[78] *See* Miranda Bogen, Aaron Rieke, Shazeda Ahmed, *Awareness in Practice: Tensions in Access to Sensitive Attribute Data for Antidiscrimination*, Proceedings of the Conference on Fairness, Accountability, and Transparency 2020, *available at* https://arxiv.org/pdf/1912.06171.pdf.

[79] *See* U.S. Department of Justice, Fair Housing Testing Program, *available at* https://www.justice.gov/crt/fair-housing-testing-program-1.

[80] *See* Bogen, Rieke, Ahmed, *Awareness in Practice*, Proceedings of the Conference on Fairness, Accountability, and Transparency, 2.

[81] *Id.* at 3. ("If lenders opt to collect this data, they must indicate that the information is being recorded for self-testing and monitoring purposes. If an applicant prefers not to provide their race and sex information, the lender is allowed to make their own determinations of these characteristics from visual observation and surname analysis. If the self-test demonstrates that the institution may have violated ECOA, the lender must attempt to identify the cause and extent of the violation. Save for in some instances the results of the self-test are considered privileged information.")

[82] *Id.* at 4.

[83] McKane Andrus, Elena Spitzer, Jeffrey Brown, Alice Xiang, *What We Can't Measure, We Can't Understand: Challenges to Demographic Data Procurement in the Pursuit of Fairness*, Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency (2021).

[84] Aaron Rieke, Vincent Southerland, Dan Svirsky, Mingwei Hsu, *Imperfect Inferences: A Practical Assessment*, Proceedings of the 2022 ACM Conference on Fairness, Accountability, and Transparency (2022). ("For example, Color of Change, the United States' "largest racial justice organization," has asked technology companies to "measure racial and demographic differences regarding user experience of all products." Major civil rights groups endorsed a plan by Airbnb to measure racial discrimination on its platform by collecting demographic data about its users' race. The NAACP Legal Defense and Educational Fund announced it is working with fintech lender Upstart to measure and remediate discrimination in its underwriting models. And an independent civil rights audit of Meta (previously Facebook), which incorporated the feedback and perspectives of many civil rights advocates, urged the company to adopt strategies to assess its products for bias using demographic data.")

"[o]rganizations cannot address demographic disparities that they cannot see."[85] But these tentative efforts — from firms such as Airbnb, LinkedIn, Meta, and Uber — are voluntary.

Notably, the *Blueprint for an AI Bill of Rights* recognizes the importance of demographic testing throughout development and deployment of an algorithmic systems:

> Automated systems should be tested using a broad set of measures to assess whether the system components, both in pre-deployment testing and in-context deployment, produce disparities. The demographics of the assessed groups should be as inclusive as possible of race, color, ethnicity, sex (including pregnancy, childbirth, and related medical conditions, gender identity, intersex status, and sexual orientation), religion, age, national origin, disability, veteran status, genetic information, or any other classification protected by law. The broad set of measures assessed should include demographic performance measures, overall and subgroup parity assessment, and calibration. Demographic data collected for disparity assessment should be separated from data used for the automated system and privacy protections should be instituted; in some cases it may make sense to perform such assessment using a data sample. For every instance where the deployed automated system leads to different treatment or impacts disfavoring the identified groups, the entity governing, implementing, or using the system should document the disparity and a justification for any continued use of the system.[86]

One reason demographic testing is especially important for algorithmic systems is that generalized statements of accuracy can easily mask discrimination. For example, if an algorithmic system claims to have 90% overall accuracy, it could be 100% accurate for a majority demographic group that constitutes 90% of the population, and 0% accurate for a minority population that is 10% of the population.

The Commission should encourage companies to collect or infer demographic data explicitly for antidiscrimination purposes, with appropriate protections. At a minimum, the rules that the Commission crafts in response to the commercial surveillance and

---

[85] Bogen, Rieke, Ahmed, *Awareness in Practice*, Proceedings of the Conference on Fairness, Accountability, and Transparency (FAT*), 1.
[86] White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, October 2022, 27, *available at* https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

privacy aspects of this ANPR should not hamper efforts to collect or infer demographic data for antidiscrimination testing purposes.[87]

The search for less discriminatory alternatives has also played an important role in rooting out discrimination. The search for less discriminatory alternatives frequently takes place in two contexts. First, traditional fair lending testing and compliance has lenders assess whether or not their models lead to negative outcomes for protected classes. If they do, lenders are supposed to ensure that the model serves a legitimate business need and whether changes to the model would result in less of a disparate effect. While some financial institutions do routinely test their models for discrimination risks and less discriminatory alternatives, many do not.[88] Second, the search for less discriminatory alternatives regularly takes place in the context of disparate impact litigation. But the burden falls on the plaintiff challenging an allegedly discriminatory policy or practice to identify such an alternative, an often impossible task without better demographic data.

Overall, there are few affirmative obligations for companies to explicitly search for less discriminatory alternative models. Meanwhile, voluntary efforts are often stymied by a longstanding assumption that a trade-off exists between a model's accuracy and the fairness of its outcomes.[89]

However, recent research has shown that it is often possible to develop many different, equally accurate algorithmic models that differ in the degree to which they result in disparities in outcomes across groups.[90] That is, there is not necessarily only one accurate model for a given task, and there is not always a trade-off between a model's accuracy and a model's disparities.[91] As a recent paper explains, there are usually multiple

[87] The process of collecting and using demographic data for antidiscrimination purposes must be subject to safeguards. Demographic data about an individual, like race or gender identity, can be very sensitive and potentially harmful if it's shared or used in the wrong way, particularly in the process of obtaining employment or housing. Where entities collect this information, they should be required to store such data separately from other data, and should only access and use this data for antidiscrimination purposes.
[88] *See* Task Force on Artificial Intelligence Testimony of Stephen F. Hayes, "Equitable Algorithms: How Human-Centered AI Can Address Systemic Racism and Racial Justice in Housing and Financial Services," 117th Cong. (May 7, 2021) *available at* https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-wstate-hayess-20210507.pdf.
[89] Maria De-Arteaga, Stefan Feuerriegel, Maytal Saar-Tsechansky, *Algorithmic Fairness in Business Analytics: Directions for Research and Practice*, Production and Operations Management, 31, 3749– 3770 (2022).
[90] Charles T. Marx, Flávio P. Calmon, Berk Ustun, *Predictive Multiplicity in Classification*, In Proceedings of the 37th International Conference on Machine Learning (2020).
[91] Kit T. Rodolfa, Hemank Lamba, Rayid Ghani, *Empirical Observation of Negligible Fairness–Accuracy Trade-offs in Machine Learning for Public Policy*, 3 Nat. Mach. Intel. 896-904 (2021), *available at* https://www.nature.com/articles/s42256-021-00396-x.

models with equivalent accuracy, but significantly different properties.[92] This phenomenon is called "model multiplicity," which is when "models with equivalent accuracy for a certain prediction task differ in terms of their internals—which determine a model's decision process—and their predictions."[93] This multiplicity "creates the possibility to minimize differences in prediction-based metrics across groups, notably differential validity (*i.e.*, differences in accuracy) and disparate impact (*i.e.*, differences in model predictions)."[94] This multiplicity may be the result of a variety of different factors, including "feature selection, a misspecified hypothesis class, or the existence of latent groups."[95]

Given that there can be multiple equally accurate models, selecting a model based on accuracy alone "does not lead to a selection of one unique model best suited for the task. Model selection on the basis of accuracy alone is an underspecified selection process."[96] Put differently, the "existence of non-unique utility-maximizing solutions has two main implications: (1) in such settings, significant gains can be made from a fairness perspective without incurring a utility loss, and (2) such gains are likely to not be realized if the optimization objective does not explicitly encode fairness considerations."[97]

Practically speaking, the phenomenon of model multiplicity directly bears on the search for less discriminatory alternative models. On the one hand, model multiplicity means that for a given prediction task, multiple models with equivalent accuracy are likely to exist, yet differ in how they minimize the effects of discrimination. On the other hand, longstanding agency guidance regarding less discriminatory alternatives suggests that policies or practices with a disparate impact may be illegal "if an alternative policy or

[92] Emily Black, Manish Raghavan, Solon Barocas, *Model Multiplicity: Opportunities, Concerns, and Solutions*, Proceedings of the 2022 ACM Conference on Fairness, Accountability, and Transparency (2022), *available at* https://dl.acm.org/doi/10.1145/3531146.3533149.
[93] *Id.* at 850.
[94] *Id.* at 854.
[95] Charles T. Marx, Flávio P. Calmon, and Berk Ustun, *Predictive Multiplicity in Classification*, In Proceedings of the 37th International Conference on Machine Learning (2020), 8, *available at* https://dl.acm.org/doi/10.5555/3524938.3525566.
[96] Black, Raghavan, Barocas, *Model Multiplicity*, Proceedings of the 2022 ACM Conference on Fairness, Accountability, and Transparency, 851.
[97] Maria De-Arteaga, Stefan Feuerriegel, Maytal Saar-Tsechansky, *Algorithmic fairness in business analytics: Directions for Research and Practice*, Production and Operations Management, at 21 (2022).

practice could serve the same purpose with less discriminatory effect"[98] or if an "alternative that is approximately equally effective is available that would cause less severe adverse impact."[99] Regardless of the precise words used to determine the threshold at which a less discriminatory alternative must be adopted because it sufficiently achieves a legitimate need,[100] model multiplicity means that the search for less discriminatory can and should be robust. In fact, given this technical and legal reality, the lack of any affirmative process to explore, discover, and implement less discriminatory alternative algorithmic systems can be understood to be unfair.[101]

Recognizing the importance of testing for less discriminatory alternative models, the *Blueprint for an AI Bill of Rights* calls for steps to be taken "[w]hen designing and evaluating an automated system . . . to evaluate multiple models and select the one that has the least adverse impact, modify data input choices, or otherwise identify a system with fewer disparities. If adequate mitigation of the disparity is not possible, then the use of the automated system should be reconsidered."[102]

Notably, full exploration of less discriminatory alternatives may mean that demographic labels are taken into account. That fact — by itself — should not warrant constitutional scrutiny. As one scholar argues, "[e]fforts to redress racial inequities, however, do not always amount to disparate treatment or racial classifications."[103] As the Supreme Court has noted, the strong basis in evidence standard "leaves ample room for [voluntary antidiscrimination] efforts."[104] Indeed, "[t]he very statutory words intended as a spur . . . to cause 'employers and unions to self-examine . . . their employment practices

[98] Department of Housing and Urban Development, Office of Federal Housing Enterprise Oversight Department of Justice, Department of the Treasury, Office of the Comptroller of the Currency Office of Thrift Supervision, Federal Reserve System, Federal Deposit Insurance Corporation, Federal Housing Finance Board, Federal Trade Commission, National Credit Union Administration, *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18266, 18269 (Apr. 15, 1994); Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve Board, Office of Thrift Supervision, National Credit Union Administration, *Interagency Fair Lending Examination Procedures*, at iv (Aug. 2009), *available at* https://www.ffiec.gov/pdf/fairlend.pdf. ("FFIEC Interagency Procedures.")
[99] FFIEC Interagency Procedures, Appendix, at 27, *available at* https://www.ffiec.gov/pdf/fairappx.pdf.
[100] A variety of different words are used to describe how an alternative must perform relative to the baseline policy or practice. One common phrase is that the alternative must be "equally effective" as the practice at issue. While that phrase suggests impenetrable precision and stringency, courts have acknowledged that "equally effective" may mean something more like "equivalent, comparable, or commensurate, rather than identical." *See* Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 713 (E.D. Pa. 1999) rev'd on other grounds, 198 F.3d 107 (3d Cir. 1999).
[101] *See* Section III.C.
[102] White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, October 2022, 27, available at https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.
[103] Pauline T. Kim, *Race-Aware Algorithms: Fairness, Nondiscrimination and Affirmative Action*, 110 Calif. L. Rev. 1539, 1544 (2022).
[104] *Ricci v. DeStefano*, 557 U.S. 557, 583 (2009).

and to endeavor to eliminate . . .' [discrimination] cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action."[105] Moreover, as one scholar notes:

> the absence of a definitive baseline model means that there is no single "correct" model against which interventions to reduce bias can be measured. Individual outcomes are not stable, but can vary depending upon small choices made in the model-building process. As a result, it is difficult to say for certain that a particular individual would have been selected absent considerations of racial equity and therefore has some settled expectation that was disrupted.[106]

II. The FTC is justified in prescribing rules to address discrimination as an unfair practice.

Discrimination is often clearly unfair. An "unfair practice" is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[107] In determining if a practice is unfair, the Commission may "consider established public policies as evidence to be considered with all other evidence," though "public policy considerations may not serve as a primary basis for such determination."[108]

The statutory authority is purposefully broad: It empowers the Commission to take action to prevent businesses from using unfair practices in or affecting commerce.[109] As discussed below, discrimination can often cause substantial injury that is neither reasonably avoidable, nor outweighed by countervailing interests to consumers or competition.

A. Discriminatory practices often easily satisfy the unfairness test.

[105] *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).
[106] Pauline T. Kim, *Race-Aware Algorithms: Fairness, Nondiscrimination and Affirmative Action*, 110 Calif. L. Rev. 1539, 1554 (2022).
[107] 15 U.S.C. § 45(n).
[108] *Id.*
[109] 15 U.S.C. § 45(a)(2). The FTC's purview excludes some entities such as air carriers, banks, credit unions, and savings associations.

Unfair practices are those that are (i) likely to cause substantial injury (ii) not reasonably avoidable, and (iii) not outweighed by countervailing benefits to consumers or competition. Discriminatory practices often easily satisfy each of these three factors.

First, discrimination clearly causes substantial injury in many situations. The FTC has generally interpreted economic, monetary, or health-related tangible harms to constitute a substantial injury.[110] A substantial injury cannot be trivial or speculative. When companies use algorithmic systems, particularly in civil rights contexts, to screen, steer, or otherwise cause discriminatory outcomes based on protected class status, consumers suffer substantial injury. They may be denied a critical opportunity (*e.g.,* screened out of a job interview) or suffer monetary harms (*e.g.,* steered to higher rates or fees). The harms arising from discriminatory practices clearly cause "substantial injury" as understood by the FTC. Critically, discrimination can also be *per se* a substantial injury. As Chair Khan and Commissioner Slaughter noted in their statement *In re Napleton Automotive Group*, "discrimination based on protected status is a substantial injury to consumers. Discrimination based on disparate treatment or impact has wide-reaching and long-term effects that research from a variety of disciplines continues to uncover and quantify."[111]

Second, discrimination is not reasonably avoidable. When a company discriminates using an algorithmic system to deny someone a critical opportunity, it is not reasonably avoidable for that person by definition. That is, when an algorithmic system denies someone an opportunity for entirely discriminatory reasons, there is nothing a consumer can do to avoid that harm. Further, in cases where a consumer is steered into an inferior product or service, it's rare that the consumer will even know an algorithmic system is being used to evaluate them. Even if a company provided disclosure about the use of an algorithmic system, a consumer's only recourse would be to not use it. Clearly, discrimination can be an "obstacle to the free exercise of consumer decision-making."[112]

Third, discriminatory harms are not outweighed by countervailing benefits to consumers or competition. Historically, the Commission has explained that cost-benefit

---

[110] Federal Trade Commission, Policy Statement on Unfairness (Dec. 17, 1980), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-Unfairness.

[111] Federal Trade Commission, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter, *In the Matter of Napleton Automotive Group*, Commission File No. 2023195, Mar. 31, 2022 3, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20Joined%20by%20RKS%20in%20re%20Napleton_Finalized.pdf.

[112] Federal Trade Commission, Policy Statement on Unfairness (Dec. 17, 1980), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-Unfairness.

analysis assumes that commercial practices "entail a mixture of economic and other costs and benefits for purchasers. . . . The Commission is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects."[113] The Commission has also noted it will examine the cost of possible remedies. More recently, *In re Napleton Automotive Group*, Chair Khan and Commissioner Slaughter noted that "injuries stemming from disparate treatment or impact are not outweighed by countervailing benefits to consumers or competition."[114] Further, "any purported benefit that can be achieved without engaging in the [discriminatory] conduct causing substantial injury is not countervailing, and does not overcome the costs associated with discrimination."[115] Notably, "the only harms and benefits on the scale are those resulting from the specific practice being challenged."[116]

Using the framework articulated *In re Napleton Automotive Group*, it would be the rare case in which discriminatory harms are outweighed by countervailing benefits. Given the significant costs of discriminatory practices, even expensive remedial steps would generate a larger benefit for consumers and competition. Commissioner Phillips recently expressed concern that because unfairness requires that the costs of a business practice outweigh its benefit, "the Commission could determine that a business practice that was legitimate and for which there was no less restrictive alternative was nonetheless illegal discrimination under Section 5 because, in our view, the benefits of the conduct didn't justify the discrimination."[117] But when it comes to algorithmic systems, as documented above, the space of potential less discriminatory alternative models is incredibly broad.[118] Rarely will it be the case where there is one single most accurate model with no available

[113] *Id.*
[114] Federal Trade Commission, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter, *In the Matter of Napleton Automotive Group*, Commission File No. 2023195, Mar. 31, 2022 3, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20Joined%20by%20RKS%20in%20re%20Napleton_Finalized.pdf.
[115] *Id.* at 4.
[116] Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis?*, 83 Geo. Wash. L. Rev. 1999, 2018 (2015). For example, in *International Harvester*, the Commission did not "analyze the overall benefits of IHC tractors or the benefit to consumers of IHC generally. Instead, the Commission strictly limited itself to considering the harms and benefits of IHC not effectively disclosing the risk of fuel geysering. *Id.* at 2019. In *Apple*, "the majority weighed the costs and benefits of Apple's failure to disclose the existence of the fifteen-minute purchase window." *Id.* at 2019-20. The Commission did not compare the costs of the failure to disclose "with the benefits of the design choice to use a fifteen-minute purchase window, or to compare the harm to the overall sales of the iPhone or iPad or total Apple sales more broadly." *Id.* at 2024. Construing the countervailing benefits test that broadly would mean that "[a]s long as a company's extensive line of products benefited consumers overall, the company would be free to inflict a significant amount of consumer harm with impunity." *Id.*
[117] Dissenting Statement of Commissioner Noah Joshua Phillips Regarding *Federal Trade Commission vs. Passport Automotive Group, Inc. et al.* FTC File No. 2023199, Oct. 14, 2022, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Dissenting-Statement-of-Commissioner-Noah-Joshua-Phillips.pdf.
[118] *See* Section I.D.iii.

less discriminatory alternatives. And, as explained further below, it is widely recognized that certain practices may violate the FTC Act while complying with the technical requirements of other laws.

The Commission's recent enforcement against Passport Automotive Group offers a straightforward example of applying unfairness authority to discriminatory commercial practices.[119] In that case, Passport had a policy of charging consumers for whom it arranged financing a markup of 200 basis points or 2%.[120] Employees were allowed to reduce or eliminate that markup, but were supposed to document any deviations from the standard markup and have those certification forms reviewed by other employees not involved in the sale.[121] But Passport's "discretionary markup rate practice has resulted in Passport charging, on average, Black and Latino consumers higher markups than non-Latino White consumers," and those disparities were found to be statistically significant.[122] Between August 2017 and August 2020, Passport charged Black consumers, on average, approximately $291 and Latino consumers, on average, approximately $235 more than non-Latino White consumers.[123] Notably, Passport was on notice about this discrimination because Passport received "letters from a finance company . . . notifying it of statistically significant differences in the markup rates charged to Black borrowers at two separate Passport dealerships."[124] Clearly, Passport's practice of charging Black and Latino consumers higher markups than non-Latino white consumers caused a substantial injury.

Because Black and Latino consumers could not have known that Passport charges other consumers a lower rate based on their race, color, or national origin, these consumers could not have reasonably avoided Passport charging them higher vehicle financing costs.[125] And in part because Passport's "discretionary markup practice is not justified by a business necessity that could not be met by a less discriminatory alternative,"[126] the Commission found there to be no countervailing benefits in charging certain consumers higher markup rates based on their race, color, or national origin.[127]

[119] *Federal Trade Commission v. Passport Automotive Group, Inc.*, Case No. 8:22-cv-02670-GLS (D. Md. 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Complaint%20Passport%20Auto%20Group%2C%20Inc.%2C%20et%20al..pdf.
[120] *Id.* at 26.
[121] *Id.* at 27.
[122] *Id.* at 29.
[123] *Id.*
[124] *Id.* at 30.
[125] *Id.* at 32.
[126] *Id.* at 31.
[127] *Id.* at 32.

B. An unfair practice may also violate other federal or state laws.

As Chair Khan, Commissioner Slaughter, and Commissioner Bedoya crisply explained in a recent joint statement, "[w]here Congress passes laws prohibiting conduct that also violates the FTC Act, the FTC often charges violators with the full range of law violations, including Section 5."[128] It is a well-settled, non-controversial proposition that an unfair, deceptive, or abusive act or practice may also violate other federal or state laws. The Federal Deposit Insurance Corporation (FDIC), the Consumer Financial Protection Bureau (CFPB), the Board of Governors of the Federal Reserve System, and the Office of the Comptroller of the Currency all reiterate this basic proposition in a variety of compliance documents.[129] Separately, both the Office of Thrift Supervision's Examination Manual and interagency guidance from the Federal Reserve and FDIC observe that "[u]nfair or deceptive practices that target or have a disparate impact on consumers who are members of these protected classes may violate the ECOA or the FHA, as well as the FTC Act."[130]

Indeed, the Commission regularly pursues unfair or deceptive acts or practices violations where the unfair or deceptive act or practice also overlaps with other federal laws. For example, in *FTC v. Liberty Chevrolet, Inc.,* the Commission alleged that Bronx Honda violated Section 5 of the FTC Act by making unauthorized charges that consumers could not reasonably avoid or consent to. The Commission also alleged that the same charges that were made without the consumers' consent violated the Equal Credit Opportunity Act (ECOA) because Black and Hispanic consumers were charged more

---

[128] Joint Statement of Chair Lina M. Khan, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya, *In the Matter of Passport Auto Group*, Commission File No. 2023199, Oct. 18, 2022, 2, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/joint-statement-of-chair-lina-m.-khan-commissioner-rebecca-kelly-slaughter-and-commissioner-alvaro-m.-bedoya-in-the-matter-of-passport-auto-group.pdf.

[129] Federal Deposit Insurance Corporation, Consumer Compliance Examination Manual, VII-1.1, (June 2020) ("[u]nfair, deceptive, or abusive acts or practices that violate the FTC Act or the Dodd-Frank Act may also violate other federal or state laws"); Consumer Financial Protection Bureau, Supervision and Examination Manual Part II.C., Unfair, Deceptive or Abusive Acts or Practices (UDAAPs) (March 2022) ("[a]n unfair, deceptive, or abusive act or practice may also violate other federal or state laws"); Board of Governors of the Federal Reserve System, Consumer Compliance Handbook, IV. Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices, 1 (12/16) ("[s]ome acts or practices may violate both section 5 of the FTC Act and other federal or state laws"); Office of the Comptroller of the Currency, Comptroller's Handbook Consumer Compliance Unfair or Deceptive Acts or Practices and Unfair, Deceptive, or Abusive Acts or Practices, Version 1 (June 2020) ("[a]cts or practices that violate section 5 of the FTC Act, or sections 1031 or 1036 of Dodd–Frank, may also violate other federal or state laws or regulations").

[130] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Unfair or Deceptive Acts or Practices by State-Chartered Banks, March 11, 2004, at 6, *available at* https://www.federalreserve.gov/boarddocs/press/bcreg/2004/20040311/attachment.pdf; Office of Thrift Supervision, Unfair or Deceptive Acts or Practices, Federal Trade Commission Act, Section 5 Examination Handbook (Rescinded), May 2010, *available at* https://www.occ.gov/static/ots/exam-handbook/ots-exam-handbook-1354.pdf

without their knowledge or consent.[131] Separately, in *FTC v. Grand Teton Professionals, LLC*, the Commission alleged that Grand Teton's use of its anti-disparagement provisions to prevent consumers from truthfully speaking out about harmful business practices violated Section 5 of the FTC Act and was also unlawful under the Consumer Review Fairness Act because it restricted the consumer from engaging in covered communication.[132]

Beyond cases where, depending on particular facts, some practices may simultaneously violate various federal or state laws (including, for example, the FTC Act, the Truth in Lending Act, and the ECOA), default rules also exist. For example, violations of the Commission's Children's Online Privacy Protection Rule constitute an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5 of the FTC Act.[133] The Commission's recent enforcement actions against Kurbo, Inc. and YouTube offer clear examples.[134] Similarly, violation of the ECOA and Regulation B constitutes a violation of the FTC Act.[135]

C. Other federal and state agencies offer important precedents in applying unfairness to discrimination.

The use of unfairness authority to reach discrimination claims is not without precedent. Several federal agencies and state legislatures have taken this view in a variety of settings.

Through guidance and examination manuals, a number of federal agencies have articulated how unfairness authority can reach discrimination. Most recently in March 2022, the CFPB updated its examination manual to clarify that its Dodd-Frank unfairness authority (the standard for which shares the same three-factor test as the FTC Act) can reach discrimination claims. As the CFPB's updated examination manual describes: "Foregone monetary benefits or denial of access to products or services, like that which may result from discriminatory behavior, may also cause substantial injury," and

[131] *Federal Trade Commission v. Liberty Chevrolet, Inc.*, Case No. 1:20-cv-03945 (S.D.N.Y. 2020), *available at* https://www.ftc.gov/system/files/documents/cases/bronx_honda_complaint_0.pdf.
[132] *Federal Trade Commission v. Grand Teton Professionals, LLC*, Case No. 3:19-cv-00933 (D. Conn. 2019), *available at* https://www.ftc.gov/system/files/documents/cases/182_3168_grand_teton_complaint_6-21-19.pdf.
[133] Pursuant to Section 1303(c) of COPPA, 15 U.S.C. § 6502(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57(a)(d)(3).
[134] *Federal Trade Commission v. Kurbo, Inc.*, Case No. 22-CV-946 (N.D. Cal. 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/filed_complaint.pdf; *Federal Trade Commission v. Google, LLC,* Case No. 1:19-cv-2642 (D.D.C. 2019) *available at* https://www.ftc.gov/system/files/documents/cases/youtube_complaint.pdf.
[135] Pursuant to §704(c) of ECOA at 15 U.S.C. 1691c(c).

“[c]onsumers cannot reasonably avoid discrimination.”[136] As the CFPB’s Assistant Director for the Office of Enforcement and Assistant Director for Supervision Policy explained in a blog post:

> When people of color suffer racist conduct in the financial marketplace, it can cause substantial monetary and non-monetary harms. Depending on how the conduct occurs (face-to-face, digital, systematic, etc.), many individuals may be unaware they received disparate treatment or a discriminatory outcome. Even when they are aware, there can be a feeling of unavoidability or powerlessness to stop the discrimination. However, such practices fall squarely within our mandate to address and eliminate unfair practices.[137]

The Department of Transportation (DOT) had adopted a similar view. In issuing updated guidance regarding the Department’s interpretation of unfair and deceptive practices, the Department noted that “[a]s a public policy matter, the Department has found that discriminatory conduct in and of itself constitutes an unfair practice.”[138] In doing so, the DOT pointed to a number of relevant historic agency actions. For example, after September 11, 2001, the DOT investigated American Airlines after DOT started to receive reports that individuals were “removed from flights or denied boarding on flights allegedly because those persons were, or were perceived to be, of Arab, Middle Eastern or Southeast Asian descent and/or Muslim.”[139] In a 2004 consent order with American Airlines, the DOT noted that:

> Federal law is clear. An airline cannot refuse passage to an individual because of that person 's race, color, national origin, religion, sex, or ancestry. 49 U.S.C . § 40127(a). Similarly, 49 U.S.C. § 41310 prohibits air carriers and foreign air carriers from engaging in unreasonable

[136] Consumer Financial Protection Bureau, Supervision and Examination Manual Part II.C., Unfair, Deceptive or Abusive Acts or Practices (UDAAPs) (March 2022), Manual V.3, 2.
[137] Eric Halperin, Lorelei Salas, “Cracking down on discrimination in the financial sector,” Consumer Financial Protection Bureau, Mar. 16, 2022, *available at* https://www.consumerfinance.gov/about-us/blog/cracking-down-on-discrimination-in-the-financial-sector/.
[138] Department of Transportation, Guidance Regarding Interpretation of Unfair and Deceptive Practices, 87 FR 52677, 52679, Aug. 29, 2022, *available at* https://www.federalregister.gov/documents/2022/08/29/2022-18170/guidance-regarding-interpretation-of-unfair-and-deceptive-practices.
[139] Department of Transportation, OST 2003-15046, Consent Order, Feb. 27, 2004, *available at* https://www.transportation.gov/sites/dot.gov/files/docs/American%20Airlines%20Inc.%20Dkt%20OST%202003-15046.pdf.

> discrimination against individuals on flights between the U.S. and foreign points, 49 U.S.C. § 41702 requires that U.S. carriers provide safe and adequate transportation, and 49 U.S.C. § 41712 *prohibits unfair and deceptive practices and, therefore, prohibits invidiously discriminatory practices on the part of U .S. carriers*.[140] (emphasis added)

The DOT reiterated this position in 2011, in a consent order with United Airlines,[141] and yet again in 2018, in a consent order with Scandinavian Airlines.[142]

Beyond federal agency actions, federal law has also clarified that discrimination can constitute an unfair practice. In itemizing unfair labor practices, the Federal Labor Relations Act notes that:

> "it shall be an unfair labor practice for a labor organization . . . to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition."[143]

Beyond the federal government, a number of state governments have determined that discriminatory practices are unfair practices. For example, the rules and regulations of the Colorado Civil Rights Commission define "Discriminatory or Unfair Practice" as "one or more acts, practices, commissions or omissions prohibited by the Law."[144] The Colorado Anti-Discrimination Act (CADA) has several provisions related to employment, housing, public accommodations, and disability that jointly define discriminatory and/or unfair practices.[145] The Iowa Civil Rights Act jointly defines unfair and discriminatory practices throughout civil rights laws regulating employment, housing, credit, public accommodations, and education.[146] Washington state's law on discrimination does the

---

140 *Id.*
141 Department of Transportation, OST-2011-0003, Consent Order, Nov. 1, 2011, *available at* https://www.transportation.gov/sites/dot.gov/files/docs/eo_2011-11-02.pdf. ("Finally, 49 U.S.C. § 41712 prohibits unfair and deceptive practices by air carriers. Each of these provisions has been interpreted to prohibit air carriers from discriminating on the basis of race, color, national origin, religion, sex, or ancestry.")
142 Department of Transportation, OST-2018-0001, Consent Order, Nov. 16, 2018, *available at* https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/325416/sas-consent-order.pdf.
143 5 U.S.C. § 7116(b)(4).
144 3 Colo. Code Regs. § 708-1-10.2(K).
145 *See* Colo. Rev. Stat. §§ 24-34-402, § 24-34-502, § 24-34-602, § 24-34-802.
146 *See* Iowa Code §§ 216.6, 216.6A, 216.7, 216.8, 216.8A, 216.8B, 216.9, 216.10, 216.11, and 216.11A.

same: jointly defining unfair and discriminatory practices in employment, real estate transactions, public accommodations, credit, and insurance.[147]

D. Statutory history and longstanding FTC practices support this approach.

Some have argued that discrimination and unfairness are distinct statutory concepts that should always be analyzed and applied separately.[148] But these arguments are not supported by a plain reading of the statute, longstanding FTC practices, and legislative intent.

The plain language of the statute is indeed plain. A practice is unfair if it meets the three-factor test. For the reasons we explain above, practices that cause discrimination often easily satisfy the statutory test.

While some note that the word "discrimination" is not in the statute, neither are the words "privacy" or "data security" — two contexts where, for decades, the Commission has used its unfairness authority to bring enforcement actions against companies that fail to provide users reasonable data security.[149]

Other claims suggest that this approach would be a misreading of legislative intent — that had Congress intended to include discrimination in its conception of unfairness, there would be no reason for Congress to pass civil rights laws decades later. Notably, this same logic was rejected by the Third Circuit in *Wyndham* when the Court "disagree[d] that Congress lacked reason to pass the recent legislation if the FTC already had regulatory authority over some cybersecurity issues."[150]

In addition, during the legislative process, Congress shared its reasons for crafting the statute the way it did:

---

[147] *See* Wash. Rev. Code §§ 49.60.175, 49.60.176, 49.60.178, 49.60.180, 49.60.215, 49.60.222.
[148] American Bankers Association, Consumer Bankers Association, Independent Community Bankers of America, U.S. Chamber of Commerce, *Unfairness and Discrimination: Examining the CFPB's Conflation of Distinct Statutory Concepts*, (June 2020) *available at* https://www.aba.com/-/media/documents/white-paper/aba-udaap-white-paper.pdf?rev=3cd415cb06f242cfb73aa4baa9a185c8.
[149] Prepared Remarks of Commissioner Alvaro M. Bedoya at The National Advertising Division Annual Conference (NAD2022), Sept. 20, 2022, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/2022.09.20%20NAD%20Speech%20-%20FINAL%20-%20POSTED.pdf.
[150] *Fed. Trade Comm'n v. Wyndham Worldwide Corp.*, 799 F.3d 236, 248 (3d Cir. 2015).

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.[151]

A House Conference Report also noted that it's "impossible to frame definitions which embrace all unfair practices . . . Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task."[152]

III. An FTC rule addressing discrimination should apply unfairness directly, while drawing from established laws and policies.

A. If a discriminatory practice causes or is likely to cause a substantial injury that is not reasonably avoidable or outweighed by countervailing benefits to consumer or competition, then it is unfair.

As we describe in Section 2.A., discriminatory practices often easily satisfy the statutory unfairness test. Unfair practices are those that are (i) likely to cause substantial injury (ii) that is not reasonably avoidable, and (iii) that is not outweighed by countervailing benefits to consumers or competition. Discriminatory practices often easily satisfy each of these elements.

The Commission applied this simple, straight-forward framework in *Passport Automotive Group*. Passport routinely imposed higher borrowing costs on Black and Latino buyers and also charged them bogus fees. These buyers suffered clear economic injury (in the form of higher fees for the same products), couldn't avoid the injury (because they had no way of knowing their white counterparts were being charged lower fees), and this pricing scheme afforded no countervailing benefit. Using this framework not only has the benefit of being deeply familiar to Commission staff, but it's also administrable, predictable, workable, and will not become obsolete. As Commissioner Bedoya states,

[151] S. Rep. No. 63–597, at 13 (1914).
[152] H.R. Rep. No. 63-1142, at 19 (1914) (Conf. Rep.).

"[w]hen a business substantially injures a person *because of who they are*, and that injury is not reasonably avoidable or outweighed by a countervailing benefit, that business has acted unlawfully."[153]

B. The FTC's approach to discrimination should be informed by established civil and human rights laws and policies.

Determining whether a discriminatory practice is unfair requires the Commission to have a framework to understand when discriminatory practices occur. That assessment should be tethered to existing federal, state, and local antidiscrimination laws and practices.

In particular, the Commission should look to other federal, state, and local laws and policies as it considers the protected classes under which discrimination occurs. Across the body of antidiscrimination laws, there are frequent targets: Many laws prohibit discrimination based on race, national origin, color, and sex (including gender identity and sexual orientation), for example. But policymakers in various jurisdictions have recognized other classes that are worthy of protection against discrimination. For example, the District of Columbia's Human Rights Act prohibits discrimination based on source of income as well as homeless status in housing, education, or public accommodation.[154] The Human Rights Act in Illinois and New York City's Human Rights Law both prohibit employment discrimination based on citizenship status.[155] In fact, existing federal guidance already documents how "some state and local laws address discrimination against additional protected classes [beyond federal civil rights laws]" and that such conduct "may also violate the FTC Act or the Dodd-Frank Act."[156] The flexibility offered by this approach also means that the Commission can be responsive to new public policies that deem new protected classes necessary.

Across the country, the public policy to combat discrimination is "declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts."[157] Indeed, it is policy of the Biden-Harris administration to

[153] Federal Trade Commission, Statement of Commissioner Alvaro M. Bedoya Regarding the Commercial Surveillance Data Security Advance Notice of Proposed Rulemaking, Aug. 11, 2022, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Bedoya%20ANPR%20Statement%2008112022.pdf.
[154] D.C. Code §§ 2–1402.21, 2–1402.31, 2–1402.41.
[155] *See* 775 Illinois Compil. Stat. 5/2-102 and N.Y.C. Admin. Code § 8-107(1)(a).
[156] Federal Deposit Insurance Corporation, Consumer Compliance Examination Manual, VII-1.7, (June 2020).
[157] Federal Trade Commission, Policy Statement on Unfairness (Dec. 17, 1980), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-Unfairness.

"pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."[158] Ultimately, the Commission's approach will be stronger when the intent that guides existing public policies that seek to combat discrimination are reflected in the Commission's reasoning.

C. An FTC rule should require companies to take affirmative and prospective steps to prevent discrimination.

When companies do not take certain basic steps to test or evaluate their algorithmic systems for potential discrimination, nor establish processes to explore, uncover, and implement less discriminatory alternative models, that should constitute an unfair practice. In other words, companies should be required to employ reasonable and appropriate antidiscrimination measures when building, deploying, and monitoring an algorithmic system. By requiring companies to prospectively address potential discrimination, the Commission will be able to reach a broader set of discriminatory harms than existing antidiscrimination law often allows.

Often "[t]here is no single wrongful act that can be pinned down as the cause of the injury, and there is no single wrongdoer who can be blamed."[159] One example would be "a black man works in an environment in which he is frozen out of crucial informal interactions and mentoring networks, performs poorly on the job due to this lack of mentoring and discomfort with comments reflecting racial stereotypes by his white colleagues, receives no formal evaluations of his work despite firm policy to the contrary, is not considered for a major promotion, and then leaves the firm."[160] Yet courts "fail to recognize such a pattern of events as discrimination, largely because they are unable to clearly identify the injury and wrongful act" — in part because there was not necessarily a specific, identifiable policy or practice.[161] Put differently, current interpretation of antidiscrimination law often "in effect prohibits not discrimination *but rather the things*

[158] Exec. Order No. 13985, 86 Fed. Reg. 7009, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.
[159] Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative Stat*e, 2006 U. Ill. L. Rev. 405, 454 (2006).
[160] *Id.*
[161] *Id.*

that count as evidence of discrimination."[162]

A more potent approach to antidiscrimination would "requir[e] employers, government officials, and other powerful actors to meet a duty of care to avoid unnecessarily perpetuating social segregation or hierarchy" where "failure to meet the duty should create a strong presumption that the challenged decision was discriminatory."[163] Indeed, the "formulation of a less discriminatory alternative test encourages the consideration of a negligence theory of . . . discrimination."[164] This theory suggests that "[i]f a less discriminatory alternative exists, the [corporation] has failed to act reasonably—it has breached its duty of care—by engaging in avoidable discrimination."[165]

The Commission has consistently taken a similar approach in its work on data security.[166] In that context, the Commission has regularly alleged that a corporation's failure to employ reasonable and appropriate security measures is an unfair practice.[167] The Commission is well positioned to examine a range of business practices and assess whether that practice — and critically, the lack thereof — is more likely than not to cause a substantial injury that's not reasonably avoidable and not outweighed by countervailing benefits.

Such an approach especially makes sense when discrimination involves the use of algorithmic systems, where even the creators of systems often cannot explain exactly why a particular outcome occurred. Recent work describing model instability reinforces this fact: Models can be surprisingly affected by small changes such as removing a single person from a training set or a random draw of the training dataset.[168]

For firms developing, testing, deploying, and operationalizing algorithmic systems, it is well-established that certain basic processes can help identify potential

[162] Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 Stan. L. Rev. 1381, 1384 (2014).
[163] *Id.*
[164] David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. Pa. L. Rev. 899, 932 (1993).
[165] *Id.* at 933.
[166] *See e.g.*, Daniel J. Solove, Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583 (2014); William McGeveran, *The Duty of Data Security*, 103 Minn. L. Rev. 1135 (2019).
[167] *See, e.g.,* In re Dave & Buster's, Inc., 149 F.T.C. 1450 (2010) (complaint); In re BJ's Wholesale Club, Inc., 140 F.T.C. 465 (2005) (complaint).
[168] *See, e.g.,* Emily Black, Matt Fredrikson, *Leave-one-out Unfairness,* In Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency (2021), *available at* https://dl.acm.org/doi/abs/10.1145/3442188.3445894; Emily Black, Klas Leino, Matt Fredrikson, *Selective Ensembles for Consistent Predictions* (2021), *available at* https://arxiv.org/abs/2111.08230.

discrimination. For example, it should be an expectation that firms perform disaggregated evaluations of their models. Without such evaluations, standard accuracy metrics can mask a model's discriminatory effects. In describing the features of a "disparity assessment," the *Blueprint for an A.I. Bill of Rights* notes that systems "should be tested using a broad set of measures to assess whether the system components, both in pre-deployment testing and in-context deployment, produce disparities" and the measures assessed "should include demographic performance measures, overall and subgroup parity assessment, and calibration."[169] Critically, "demographic data collected for disparity assessment should be separated from data used for the automated system and privacy protections should be instituted."[170] Ultimately, demographic testing and evaluation for discrimination throughought an algorithmic system's design, implementation, and use is necessary. Companies should pursue this type of testing continuously.

Existing guidance offers a useful starting point. Take the Federal Reserve Board's Model Risk Management Guidance as an example.[171] This guidance, which is focused on banks, establishes a framework for cataloging, validating, and documenting model design, theory, and underlying logic; assessments of data quality, comprehensiveness, and relevance; validation and documentation of model and variable performance; and monitoring use of models in production.[172] As Upturn and other organizations have previously argued, these proactive practices, when properly scoped to include discrimination risks, can aid antidiscrimination efforts.[173]

Similarly, it should be an expectation that firms search for less discriminatory alternative models before and after deployment. There are a variety of different methods

---

[169] White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, October 2022, 26, *available at* https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.
[170] *Id.*
[171] Federal Reserve Board, Office of the Comptroller of the Currency, Supervisory Guidance on Model Risk Management, SR 11-7 at 3 (Apr. 4, 2011), *available at* https://www.federalreserve.gov/supervisionreg/srletters/sr1107a1.pdf.
[172] *Id.*
[173] Comment from National Fair Housing Alliance, et al., Regarding Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, including Machine Learning, OCC-2020-0049, (Jul. 2, 2021) *available at* https://www.regulations.gov/comment/OCC-2020-0049-0055; *see also* Upturn, et al., Addressing Technology's Role in Financial Services Discrimination, (Jul. 13, 2021) *available at* https://www.upturn.org/static/files/letter-to-ostp-on-financial-services-technologies-20210713.pdf.

companies can use to explore the space of less discriminatory alternative models.[174] At a minimum, a company should adopt an alternative model if it is less discriminatory and any resulting drop in performance is reasonable. Put a different way, if a reasonable alternative practice would serve the same business purpose while reducing the disproportionate impact on protected class members, continued use of the original practice should constitute an unfair practice.

D. The FTC should examine whether certain types of discriminatory practices are unfair due to negligence.

When companies deploy algorithmic systems that use records and data that are known to be clearly discriminatory — both in the reasons the data exist in the first instance, and in the effects that the use of the data can have — that should be presumed unfair. Background checks are ubiquitous and discriminatory barriers to participation in many markets, most critically the rental housing[175] and job markets.[176] Background check companies and other data brokers collect and store records from disparate sources, such as court records databases and credit report furnishers.[177] Background check companies repackage these records into reports — which often include risk scores — that they market

---

[174] *See* Task Force on Artificial Intelligence Testimony of Stephen F. Hayes, "Equitable Algorithms: How Human-Centered AI Can Address Systemic Racism and Racial Justice in Housing and Financial Services," 117th Cong. (May 7, 2021), 4, *available at* https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-wstate-hayess-20210507.pdf. (Describing how in the "case of traditional statistical models, identifying less discriminatory alternatives often involves a process of adding, dropping, or substituting variables in the model, with the goal of identifying variations that maintain reasonable performance but that have less disparate impact on protected classes. Newer methods exist that can improve upon that process for ML models. Advancements in computing power, along with sophisticated algorithms, can help analyze the impact of many different sub-combinations of variables, which allows institutions to explore numerous iterations of variable combinations and adjustments to hyperparameter settings. Other techniques also exist, such as training models to optimize for performance and metrics of fairness.")

[175] *See, e.g.*, Consumer Financial Protection Bureau, CFPB Reports Highlight Problems with Tenant Background Checks, Nov. 15, 2022, *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-reports-highlight-problems-with-tenant-background-checks/; National Consumer Law Center, SafeRent Solutions Accused of Illegally Discriminating Against Black and Hispanic Rental Applicants, May 25, 2022, *available at* https://www.nclc.org/saferent-solution-accused-of-illegally-discriminating-against-black-and-hispanic-rental-applicants/; Tinuola Dada, Natasha Duarte, *How to Seal Eviction Records: Guidance for Legislative Drafting*, 15–18, Jul. 7, 2022, *available at* https://www.upturn.org/work/how-to-seal-eviction-records/ ("Tenant screening companies profit from repackaging eviction records, which drives housing insecurity.").

[176] *See, e.g.*, Michelle Natividad Rodriguez, Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, Mar. 23, 2011, https://www.nelp.org/publication/65-million-need-not-apply-the-case-for-reforming-criminal-background-checks-for-employment/.

[177] *See* Consumer Financial Protection Bureau, Tenant Background Checks Market Report 10–16, Nov. 2022, *available at* https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf.

and sell to landlords and employers.[178] Background check reports and scores usually include criminal, credit, and rental eviction histories.[179] These records are artifacts of race, gender, and disability discrimination in the credit, criminal legal, and housing systems; they are not created for and not reliable for making prospective housing or employment decisions.[180]

Available evidence suggests that landlords and employers rely on background checks to reject applicants — and, in the case of rental housing, to charge applicants higher security deposits or rents.[181] A recent study showed that some landlords have applied a blanket policy of rejecting applicants whose reports included an eviction record or a high risk score.[182] Our research into the online job application process indicated that most large employers use applicant tracking systems that can seamlessly integrate background check software, and that most employers appear to conduct a background

---

178 *See, e.g.*, TransUnion, ResidentScreening, https://www.transunion.com/product/resident-screening ("Clear decisions": "The insights from ResidentScreening give you a single recommendation based on your screening policies."); RentPrep, Understanding Tenant Screening Laws, *available at* https://rentprep.com/tenant-screening/tenant-screening-laws/ ("You can use your tenant screening criteria as the legal standard for selecting your next tenant."); National Tenant Network, *available at* https://ntnonline.com/ ("NTN's resident screening reports will help you identify whether an applicant is likely to be a good tenant or a problem tenant. . . . Eviction and lease violation data gives you the confidence to make sound rental decisions."); National Tenant Network, NTN DecisionPoint, *available at* https://ntnonline.com/resident-screening/ntn-decisionpoint/ ("Everything you need to make a sound rental decision."); TurboTenant, Tenant Screening Services, *available at* https:// www.turbotenant.com/tenant-screening/ ("Rent to a tenant you can trust[.] Whether you've been through an eviction yourself or just heard the horror stories from other property managers, a great rental experience starts with having the right tenant. Join over 400,000 landlords who use TurboTenant to make an informed decision and find a good tenant they trust.").

179 *See, e.g.*, TransUnion SmartMove, *available at* https://www.mysmartmove.com/ (Advertising screening reports that let landlords "see the full picture of [their] tenant," and listing credit reports, criminal reports, eviction reports, and "income insights report[s]," as the components included in their tenant screening reports); SafeRent Solutions, Resident Screening, *available at* https://saferentsolutions.com/resident-screening/ (listing credit reports, eviction & address history, criminal records, credit, and ID verification); Saferent Solutions, SafeRent Score, *available at* https://saferentsolutions.com/saferent-score/ (listing rent-to-income ratio, credit reports, and eviction history as the "key factors" influencing the score in a sample image of a tenant screening report).

180 *See, e.g.*, National Consumer Law Center, *Salt in the Wound: How Eviction Records and Back Rent Haunt Tenant Screening Reports and Credit Scores*, Aug. 2020, *available at* https://www.nclc.org/wp-content/uploads/2022/09/IB_Salt_in_the_Wound.pdf; U.S. Dep't of Housing & Urban Development, Implementation of the Office of the General Counsel's Guidance on Application of the Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 2–3, Jun. 10, 2022, *available at* https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf.

181 *See, e.g.*, Wonyoung So, *Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports*, Housing Policy Debate, Aug. 30, 2022, *available at* https://www.tandfonline.com/doi/full/10.1080/10511482.2022.2113815.

182 *Id.*

check.[183] Employers and landlords may not even know what records are incorporated into the reports and scores they receive. Background check companies attempt to evade civil rights liability by claiming that they don't make housing or employment decisions,[184] but their products are often designed and marketed to encourage landlords and employers to rely on their reports.

These practices unfairly lock people out of stable jobs and housing and prevent people from recovering from financial setbacks. Background checks leverage records that are products of systemic discrimination, further marginalizing people who are Black, Latinx, women, LGBTQ+, and/or who have disabilities.

In addition to its Fair Credit Reporting Act authority, the FTC has Section 5 authority to prevent background check companies from engaging in unfair practices, including those that have a discriminatory impact on people's ability to access jobs and housing. These unfair practices go beyond accuracy failures. By repackaging and encouraging employers and landlords to rely on discriminatory records and scores, background check companies ensure that disparate impacts in the housing and job markets will endure.

---

[183] Aaron Rieke, Urmila Janardan, Mingwei Hsu, Natasha Duarte, *Essential Work: Analyzing the Hiring Technologies of Large Hourly Employers,* Upturn, May 2021, 21–22, *available at* https://www.upturn.org/static/reports/2021/essential-work/files/upturn-essential-work.pdf.

[184] *See, e.g.*, Real Page, Propertyware and On-Site Screening Services Agreement, *available at* https://www.realpage.com/pw-screening-services/ ("Site Owner and Manager hereby release and hold harmless RealPage . . . from liability for any damages . . . resulting from any failure of the Scores to accurately predict that a United States consumer will repay their existing or future credit obligations satisfactorily. . . . Other than as expressly and spcifically set forth in these screening terms, Realpage and its vendors hereby disclaim any warranty or liability concerning (I) the accuracy, correctness, currency, availability, reliability, . . . performance, suitability, . . . or fitness for a particular purpose of . . . or (III) the results that may be obtained from the use of the information or any service."). *See also, e.g.*, Contract between RentGrow, Inc. DBA Yardi Resident Screening and the Chicago Housing Authority ("CHA") for Resident Screening Services, Mar. 31, 2017, *available at* https://www.documentcloud.org/documents/6819638-Chicago-IL-Yardi-Contract ("YRS plays no role whatsoever in determining the Eligibility Criteria for any Property, plays no role in any tenancy decisions and does not guarantee the effectiveness of Client's Applicant selection policies or the accuracy of any Credit Bureau, CRA or other information delivered by way of the Services or in a Tenant Screening Report."); Subscription agreement between On-Site and King County Housing Authority, Washington, Jan. 5, 2018, *available at* https://www.documentcloud.org/documents/6819661-King-County-WA-on-Site-Contract ("On-Site will have no liability to Client or other person or entity for any acceptance or the failure to accept . . . regardless of whether or not Client's decision was based on the Client Generated Report or other information generated by Client through the Screening Software. Client must state that the Vendors and/or On-Site did not make the decision to take adverse action against the applicant. . . . ON-SITE AND THE VENDORS DO NOT GUARANTEE THE INFORMATION FURNISHED AND WILL BE HELD HARMLESS, RECOGNIZING THAT INFORMATION IS SECURED THROUGH FALLIBLE HUMAN SOURCES AND THAT FOR THE FEE CHARGED, THE VENDORS AND ON-SITE CANNOT BE AN INSURER OF THE ACCURACY OF THE INFORMATION.").

IV. Conclusion

The FTC has an important role to play in rooting out widespread commercial practices that are biased and discriminatory, particularly against historically disadvantaged communities and the most vulnerable consumers. Under its unfairness authority, the FTC is well positioned and well justified to prescribe a rule that can address a wide range of discriminatory practices, and it should do so promptly.

We welcome further conversations on these important issues. If you have any questions, please contact Logan Koepke (Project Director, logan@upturn.org) and Harlan Yu (Executive Director, harlan@upturn.org).