December 5, 2023


Office of Management and Budget
725 17th St NW
Washington, DC 20503

*Submitted via www.regulations.gov*

> **RE: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Memorandum, OMB–2023–0020**


To Whom It May Concern,

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we submit the following comments in response to the Office of Management and Budget (OMB)'s Draft Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI).[1] AI systems used by public and private actors increasingly permeate every area of our lives, including employment, housing, government services and supports, and our interactions with law enforcement and the criminal legal system. Yet these systems reproduce or exacerbate racial bias, inequities, and discrimination. AI systems—some of which may themselves exhibit algorithmic bias, misrepresent their effectiveness, and/or rely on large amounts of sensitive, personal data—can also be deployed in ways that disproportionately harm communities of color, particularly by law enforcement, endangering their liberty and physical safety and risking a range of collateral consequences.

We applaud the OMB for proposing guidance that would acknowledge these civil rights harms and would require federal agencies to take steps to identify and address algorithmic bias. The Draft Memorandum's requirement that agencies follow minimum risk-management practices before using new or existing covered safety-impacting or rights-impacting AI, including law enforcement technologies, holds promise. The risk management practices—completing an AI impact assessment; providing public notice and plain-language documentation through the AI use

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[1] 88 Fed. Reg. 75635 (Nov. 3, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-24269.pdf; Shalanda Young, Executive Office of the President, Office of Management and Budget, Proposed Memorandum for the Heads of Executive Departments and Agencies RE: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (Nov. 3, 2023), https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf (OMB Memo).

case inventory; assessing and mitigating disparate impact; and incorporating feedback from affected groups, including underserved communities, in the design, development, and use of the AI—create an encouraging framework for protections from algorithmic bias. If finalized, the Memorandum would take an important step in translating the White House's October 2022 Blueprint for an AI Bill of Rights[2] into binding policy requirements—including for law enforcement and criminal legal system uses of AI.

In order to fully realize the potential of this memorandum, we urge OMB to strengthen and clarify several provisions. Our key recommendations include: 1. clarifying how federal agencies can assess bias and enhance equity in federal systems; 2. building in-house agency capacity for implementation; 3. ensuring the Memorandum's requirements apply to both technology funded by federal grants and technology procured from third parties; 4. mandating that Chief AI Officers (CAIOs) have civil rights expertise; 5. expanding disclosure in AI use case inventories; 6. providing additional constraints on when and how waivers can be used to exempt AI systems from minimum risk-management requirements; and 7. guaranteeing that civil rights principles guide agencies' AI strategies.

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization.[3] LDF was launched at a time when America's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. For more than 80 years, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for Black people and other people of color. LDF's mission has always been transformative: to achieve racial justice, equality, and an inclusive society.

Since its inception, LDF has worked to increase fairness and equal opportunity for Black people. Some of Thurgood Marshall's early victories in the Supreme Court came in *Shelley v. Kramer*, 334 U.S. 1 (1948), and *McGhee v. Sipes*, 334 U.S. 1 (1948), which held that the state enforcement of racially restrictive covenants violated the Equal Protection Clause. In the decades since those victories, LDF's litigation, policy advocacy, organizing, and public education programs have sought to ensure the fundamental rights of all people to quality education, economic opportunity, the right to vote and fully participate in democracy, and the right to a fair and just judicial system. LDF has continued to challenge public and private policies and practices that deny

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[2] WHITE HOUSE OFFICE OF SCI. & TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf (AI Bill of Rights).
[3] LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.

Black people housing, employment, health care, and other opportunities,[4] and has fought to address unconstitutional and racially discriminatory law enforcement conduct.[5]

## I.    AI Systems Perpetuate Bias and Discrimination Based on Race and Other Protected Categories Across Various Sectors.

AI systems frequently replicate and amplify existing discrimination and bias, denying people of color and other protected classes equal access to housing, credit, employment, and other opportunities,[6] subjecting them to increased law enforcement contact,[7] and potentially endangering their liberty. AI systems can also be deployed in ways that disparately impact certain groups—for example, by requiring recipients of public benefits to share their biometric data in order to verify their identity,[8] or disproportionately deploying surveillance technologies in particular communities. As discussed below, researchers and litigators have found algorithmic bias across several major sectors, including lending, housing, employment, health care, education, and law enforcement.

### A. *Lending and Access to Credit*

Algorithmic bias can deprive people of fair access to credit, leading them to pay more for a mortgage, credit card, or other loans or denying them credit entirely. In 2020, for example, the Student Borrower Protection Center (SBPC) tested a lending algorithm developed by a company called Upstart that incorporated educational data—including where the borrower attended college and the average SAT and ACT scores for different colleges and universities.[9] Upstart's algorithm

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[4] *E.g. Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); and *Lewis v. City of Chi.*, 560 U.S. 205 (2010). *Linton v. Comm'r of Health & Env't*, 65 F.3d 508 (6th Cir. 1995) (preservation of Medicaid-certified hospital and nursing home beds to prevent eviction of patients in favor of admitting more remunerative private-pay individuals); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenge to closure of municipal hospital serving inner-city residents); *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (admission of African-American physician to hospital staff); *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F. Supp. 427 (S.D.N.Y. 1993) (relocation of services from inner-city branch of merged hospital entity); *Rackley v. Bd. of Trs. of Orangeburg Reg'l Hosp.*, 238 F. Supp. 512 (E.D.S.C. 1965) (desegregation of hospital wards); Consent Decree, *Terry v. Methodist Hosp. of Gary*, Nos. H-76-373, H-77-154 (N.D. Ind. June 8, 1979) (planned relocation of urban hospital services from inner-city community).

[5] *Tennessee v. Garner*, 471 U.S. 1 (1985) (a seminal case that held, for the first time, that police officers cannot shoot "fleeing felons" who do not pose a threat to officers or members of the public); *see also Davis, et al. v. City of New York, et al*., 902 F. Supp. 2d 405 (S.D.N.Y. 2012).

[6] Meredith Broussard, ARTIFICIAL UNINTELLIGENCE: HOW COMPUTERS MISUNDERSTAND THE WORLD 115 (2018).

[7] Rashida Richardson, et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 NYU L. REV. 192 at 41-42 (2019), https://www.nyulawreview.org/wp-content/uploads/2019/04/NYULawReview-94-Richardson_etal-FIN.pdf

[8] *Cf.* Hannah Quay-de la Vallee, Ctr. for Democracy & Tech., *Public Agencies' Use of Biometrics to Prevent Fraud and Abuse: Risks and Alternatives* (Jun. 7, 2022), https://cdt.org/wp-content/uploads/2022/06/2022-06-02-Public-Agencies-Use-of-Biometrics-to-Prevent-Fraud-and-Abuse-Risks-and-Alternatives.pdf

[9] Student Borrower Protection Ctr., EDUCATIONAL REDLINING 16 (2019), https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf (EDUCATIONAL REDLINING); Letter from LDF & Student Borrower Protection Ctr. to Dave Girouard, CEO of Upstart Network, Inc. (Jul. 30, 2020), https://www.naacpldf.org/wp-content/uploads/2020-07-30-FINAL-Demand-Letter.pdf.

divided schools into tiers based on standardized test scores.[10] The higher the incoming class's average standardized test scores, the higher the school's tier, and the more favorable the terms offered to students who attended that school.[11] Because students of color perform worse on these standardized tests due to embedded biases, schools with higher percentages of students of color were assigned to lower tranches.[12] As a result, ninety-five percent of Historically Black Colleges and Universities (HBCU) were in the bottom rankings; just two were in the top tier.[13] In practice, this translated into substantially different loan terms for borrowers of color: SBPC found that a hypothetical graduate of the well-known HBCU Howard University who applied for a loan through Upstart's lending platform, was charged nearly $3,499 more over the life of a five-year loan when compared to a similarly situated graduate of New York University, a predominantly white institution.[14] Upstart agreed to a fair lending monitorship in response to a demand letter sent by LDF and SBPC outlining how its algorithm likely violated the Equal Credit Opportunity Act and the Fair Housing Act.[15]

### B. *Housing*

Algorithmic bias can also deny people access to housing. For example, housing providers frequently rely on tenant screening reports that include an algorithmically-generated score or a recommendation to accept or reject an applicant,[16] and tenant screening companies encourage housing providers to rely on this eligibility determination.[17] These scores usually include financial data from credit reporting agencies as well as information from data intermediaries and court

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] EDUCATIONAL REDLINING, *supra* note 9, at 16; Upstart Demand Letter, *supra* note 9.

[15] *Id.*; Press Release, LDF & Student Borrower Protection Ctr., NAACP Legal Defense and Educational Fund and Student Borrower Protection Center Announce Fair Lending Testing Agreement with Upstart Network (Dec. 1, 2020), https://protectborrowers.org/naacpldf-sbpc-upstart-agreement/

[16] Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back From Tough Times*, CONSUMER REPORTS (Mar. 11, 2021), https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/; Letter from the Nat'l Consumer Law Ctr. to Board of Governors of the Fed. Reserve Syst., et al., Re: Request for Information and Comment on the Financial Institutions' Use of Artificial Intelligence, Including Machine Learning (Jul. 1, 2021), https://www.fdic.gov/resources/regulations/federal-register-publications/2021/2021-rfi-financial-institutions-ai-3064-za24-c-041.pdf.

[17] Liran Koren, The Benefits of AI Tenant Screening, LUXURY PROPERTY CARE (Mar. 1, 2021), https://luxurypropertycare.com/ai-tenant-screening-benefits/ ("[Y]ou have better things to do than screening prospective tenants. . . . Think of AI as your assistant. It can get the essential process of tenant screening done, letting you be completely hands-off."). One recent study by Wonyoung So, a researcher at the Massachusetts Institute of Technology, found that housing providers penalized tenants by rejecting their applications or charging them higher security deposits "when they saw high-risk scores on the reports, rather than utilizing detailed information to make more precise judgements" even when that information was available. Wonyoung So, *Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports*, HOUSING POL'Y DEBATE (Aug. 30, 2022), https://www.tandfonline.com/doi/full/10.1080/10511482.2022.2113815.

databases on arrests, convictions, and evictions[18] which can disproportionately exclude people of color and other protected classes from housing opportunities.

Similarly, the Markup recently investigated the scoring system the Los Angeles Homeless Services Authority uses to match people in need with subsidized housing.[19] The U.S. Department of Housing and Urban Development requires the use of such a prioritization system to become eligible for certain federal housing funds under its rules.[20] The Markup's investigation found that Black and Hispanic people were significantly less likely than white people to score high enough to be placed in the "high priority" group for housing placement, even though they were overrepresented in Los Angeles' homeless population as a whole.[21]

## C. Employment

Employers—including the federal government—increasingly rely on AI and other automated tools throughout the hiring process, from steering job advertisements toward certain candidates through sites like LinkedIn, to identifying strong applicants based on analyses of their resumes, and  assessing candidate competencies.[22] Unfortunately, algorithmic decision-making systems used to identify strong candidates are likely to reflect existing patterns of occupational segregation. For example, algorithms that are developed using a data set where people of color are underrepresented among doctors, lawyers, and other professions, or where women are more often nurses and men are more often doctors, may take these observed patterns as a given, resulting in unfair disadvantages for people of color, women, and other protected classes.[23] As a result, researchers have found that algorithms used to decide who is shown advertisements regarding employment opportunities discriminate based on race and gender, often reflecting stereotypes about who works certain kinds of jobs.[24] Similar issues can arise when employers use ADSs to

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[18] Tech Equity Collaborative, Tech, Bias, and Housing Initiative: Tenant Screening (Feb. 23, 2022), https://techequitycollaborative.org/2022/02/23/tech-bias-and-housing-initiative-tenant-screening/.

[19] Colin Lecher & Maddy Varner, *L.A.'s Scoring System for Subsidized Housing Gives Black and Latino People Experiencing Homelessness Lower Priority Scores*, THE MARKUP (Feb. 28, 2023), https://themarkup.org/investigation/2023/02/28/l-a-s-scoring-system-for-subsidized-housing-gives-black-and-latino-people-experiencing-homelessness-lower-priority-scores.

[20] *Id.*

[21] *Id.*

[22] Alex Engler, *Auditing Employment Algorithms for Discrimination,* BROOKINGS INST. (Mar. 12, 2021), https://www.brookings.edu/research/auditing-employment-algorithms-for-discrimination/.

[23] Pauline Kim, *Manipulating Opportunity*, 106 VA. L. REV. 867, 897 (2020), https://deliverypdf.ssrn.com/delivery.php?ID=5670870690870710710881260710041141250490020100830050451240810931081250180701180890670190110000430621110540920030140701260730901100490620170170950300050780851110880440541171130891110740800820031170941040720870941061131060281230760820640920300130013001&EXT=pdf&INDEX=TRUE.

[24] Muhammad Ali, et al., *Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes*, PROCEEDINGS OF THE ACM ON HUMAN-COMPUTER INTERACTION, vol. 3, Nov. 2019, at 20, 30, https://www.ftc.gov/system/files/documents/public_events/1548288/privacycon-2020-muhammad_ali.pdf;   Piotr Sapiezynski, et al., *Algorithms That "Don't See Color": Comparing Biases in Lookalike and Special Ad Audiences*, PROCEEDINGS OF THE 2022 AAAI/ACM CONFERENCE ON AI, ETHICS, & SOCIETY (Jul. 2022), https://dl.acm.org/doi/10.1145/3514094.3534135; Ava Kofman & Ariana Tobin, *Facebook Ads Can Still*

screen resumes.[25] Finally, several companies market products to employers that they claim can reliably extrapolate personality traits and predict social outcomes, such as job performance.[26] Some of these tools rely on assessments of observable physical factors like facial or voice recognition,[27] despite the fact that these technologies are less accurate at assessing people with darker skin[28] and the voices of Black people.[29] As such, they may produce inaccurate results for people of color.

## D. *Healthcare*

Health care providers increasingly rely on algorithms to help diagnose and treat patients, yet these algorithms can lead to Black patients to receive worse care.[30] For example, although Black Americans are four times more likely to have kidney failure, the standard algorithm used around the country to determine transplant list placement explicitly uses race as a factor and puts Black patients lower on the list than white patients, even when all other factors remain identical.[31] Many doctors now believe that the data that led the algorithm's developers to include the race coefficient is actually a reflection of both systemic health disparities and discrimination by providers, and that the continued use of the algorithm leads to negative health outcomes for Black patients.[32]

## E. *Education*

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*Discriminate Against Women and Older Workers, Despite a Civil Rights Settlement*, PROPUBLICA (Dec. 13, 2019, 5:00 AM), https://www.propublica.org/article/facebook-ads-can-still-discriminate-againstwomen-and-older-workers-despite-a-civil-rights-settlement.

[25] Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias against Women*, REUTERS (Oct. 10, 2018), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G (describing how a resume screening tool developed by Amazon, "learned" to systematically downgrade the resumes of women regardless of their qualifications for the job because the model was "trained" using resumes submitted to the company over a ten-year period—overwhelmingly from men. For example, the ADS penalized resumes that included the word "women's," as in "women's chess club captain," and downgraded graduates of two all-women's colleges.).

[26] Rebecca Heilweil, *Artificial Intelligence Will Help Determine If You Get Your Next Job*, RECODE (Dec. 12, 2019), https://www.vox.com/recode/2019/12/12/20993665/artificial-intelligence-ai-job-screen.

[27] Aaron Riecke & Miranda Bogen, UPTURN, HELP WANTED: AN EXAMINATION OF HIRING ALGORITHMS, EQUITY, AND BIAS (2018), https://www.upturn.org/work/help-wanted/.

[28] Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification,* PROCEEDINGS OF MACHINE LEARNING RESEARCH, vol. 81, 2018, http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf.

[29] Allison Koenecke, et al., *Racial disparities in automated speech recognition*, 117 PNAS 7684, https://www.pnas.org/doi/10.1073/pnas.1915768117.

[30] Donna M. Christensen, *Medical Algorithms Are Failing Communities of Color*, HEALTH AFFAIRS (Sept. 9, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210903.976632/.

[31] Rae Ellen Bitchell & Cara Anthony, *Kidney Experts Say It's Time to Remove Race from Medical Algorithms. Doing So Is Complicated,* HEALTH AFFAIRS (Jun. 8, 2021), https://khn.org/news/article/black-kidney-patients-racial-health-disparities/?utm_campaign=KHN%3A%20Daily%20Health%20Policy%20Report&utm_medium=email&_hsmi=132394588&_hsenc=p2ANqtz--4ODxarsKPHQSQeAfuOeyLJlAbaGTNgUoPyX4KJJqtvaQOUyan-ZRycCujUe8kMR623a6e7lV0KBUtZgGVacR1ynlazQ_Tte4IvXmfHP2n4J1zvI0&utm_content=132394588&utm_source=hs_email.

[32] *Id.*

Technologies used in the education sector risk entrenching the school-to-prison pipeline for Black and Brown youth. There is no independent evidence that student activity monitoring software, for example, improves student safety.[33] On the contrary, studies show that more surveillance in schools *decreases* students' perceptions of safety, equity, and support.[34] Research shows that schools with more students of color are already more likely to adopt stricter and more encompassing surveillance, security, and law enforcement methods.[35] By purchasing student activity monitoring software, administrators are investing in oppressive technologies rather than more empirically supported services to create positive school climates.[36]

## F. *Law Enforcement*

Law enforcement agencies use algorithmic technologies for a wide variety of functions, from social media monitoring, crime forecasting, license plate readers, to algorithms used to decide where to deploy officers and to identify purported suspects.[37] These technologies often rely on data reflecting racially discriminatory policing practices and their use creates a feedback loop that perpetuates discriminatory patterns.[38] The use of these technologies by law enforcement officers increases officers' powers to surveil and perpetuate state violence against people of color without creating safer communities.[39] These new technologies are often deployed with little to no transparency regarding when they are used, what data sources they rely on, how they make

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[33] Todd Feathers, *Schools Spy on Kids to Prevent Shootings, But There's No Evidence It Works*, VICE (Dec. 4, 2019), https://www.vice.com/en/article/8xwze4/schools-are-using-spyware-to-prevent-shootingsbut-theres-no-evidence-it-works (*Schools Spy*). ("If there is evidence or research that is available, it's provided by the vendor. It's not provided by an independent researcher.").

[34] Mona Wang & Gennie Gebhart, *Schools Are Pushing the Boundaries of Surveillance Technologies*, EFF (Feb. 27, 2020), https://www.eff.org/deeplinks/2020/02/schools-are-pushing-boundaries-surveillance-technologies; Sarah Lindstrom Johnson et al., *Surveillance or Safekeeping? How School Security Officer and Camera Presence Influence Students' Perceptions of Safety, Equity, and Support*, J. OF ADOLESCENT HEALTH 1 (Sept. 2018).

[35] Melinda D. Anderson, *When School Feels Like Prison*, ATLANTIC (Sep. 12, 2016), https://www.theatlantic.com/education/archive/2016/09/when-school-feels-like-prison/499556/ (discussing study that "found that the concentration of students of color was a predictor of whether or not schools decided to rely on more intense [security] measures").

[36] *See, e.g.,* Cara McClellan, NAACP Legal Defense and Educational Fund, Inc., OUR GIRLS, OUR FUTURE: INVESTING IN OPPORTUNITY & REDUCING RELIANCE ON THE CRIMINAL JUSTICE SYSTEM IN BALTIMORE 2 (2018), *available at* https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf.

[37] *See, e.g.,* TIM LAU, BRENNAN CTR. FOR JUST, PREDICTIVE POLICING EXPLAINED (2020), https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained.

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

[39] George Joseph, *What Are License-Plate Readers Good For? Automatic plate-readers catch few terrorists or violent criminals, but do plenty of harm to low-income communities of color*, BLOOMBERG NEWS (Aug. 5, 2016), https://www.bloomberg.com/news/articles/2016-08-05/license-plate-readers-catch-few-terrorists-but-lots-of-poor-people-of-color; Rashida Richardson, et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 NYU L. REV. 192 (2019), https://www.nyulawreview.org/wpcontent/uploads/2019/04/NYULawReview-94-Richardson-Schultz-Crawford.pdf; Brian Jefferson, DIGITIZE AND PUNISH: RACIAL CRIMINALIZATION IN THE DIGITAL AGE (2020), https://www.jstor.org/stable/10.5749/j.ctvz0h9s7 ("[d]igital databases, not detention centers . . . are becoming the leading edge of criminal justice in the United States. While more than 2 million people are incarcerated . . . the Bureau of Justice Statistics estimates that 100,596,300 names are stored in criminal history databases. In some cities, 80 percent of the black male population is registered in these databases.").

decisions, whether they have been independently validated or tested for bias, or notice or explanation to people on whom they are used about why or how they may be adversely affected.

## II. The Draft Memorandum Builds Upon the Blueprint for an AI Bill of Rights to Require Federal Agencies to Take Steps to Identify and Address Algorithmic Bias

We commend the administration for advancing efforts to identify and address algorithmic bias. As several federal agencies have recognized, existing civil rights and consumer protection laws—such as Title VII of the Civil Rights Act of 1964, the Fair Housing Act, the FTC Act, and the Equal Credit Opportunity Act—apply to algorithmic discrimination and, in many cases, bar the deployment of algorithms that have a disparate impact on protected classes.[40] The federal government has an obligation not only to vigorously enforce these protections, but to ensure that its own uses of AI comply with these laws and the U.S. Constitution. While the administration's Blueprint for an AI Bill of Rights articulated a set of principles to protect the public from algorithmic bias and other threats to civil rights which occur with the increased use of automated systems, its guidance was not binding. The Draft Memorandum begins the process of embedding these principles within the policies and practices of federal agencies.

In October 2022, the White House Office of Science and Technology Policy took the positive step of issuing a Blueprint for an AI Bill of Rights, which recognized that people should "not face discrimination by algorithms and systems should be used and designed in an equitable way."[41] The Blueprint acknowledges that discrimination by algorithms may, in certain circumstances, violate existing laws,[42] and recommends that "designers, developers, and deployers of automated systems . . . take proactive and continuous measures to protect individuals and communities from algorithmic discrimination and to use and design systems in an equitable way," including conducting equity assessments as part of the system design, using representative and accurate data and protecting against proxies for demographic features, and performing pre-deployment and ongoing disparity testing and mitigation.[43] The Blueprint also describes additional measures that should be taken to ensure that affected individuals receive adequate notice and explanation regarding the use of algorithms, as well as the availability of human alternatives, consideration, and fallback.[44] Unfortunately, the Blueprint is non-binding and does not mandate that companies take these steps.[45] Moreover, the Blueprint includes exemptions that suggest that current and future uses of AI by law enforcement need not be subjected to the same principles or should be weighed differently against law enforcement concerns.[46]

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[40] Rohit Chopra, Dir. of the Consumer Fin. Protection Bureau, Kristen Clarke, Assistant Att'y Gen. for the Justice Department's Civil Rights Division, Charlotte A. Burrows, Chair of the Equal Employment Opportunity Comm'n, & Lina M. Khan, Chair of the Fed. Trade Comm'n, Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems (Apr. 25, 2023), https://www.justice.gov/media/1289396/dl?inline
[41] AI Bill of Rights, *supra* note 2.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

The Draft Memorandum would require federal agencies to embrace several of the principles of the Blueprint and take concrete steps to address algorithmic bias and increase accountability for their use of AI. The Draft Memorandum includes, among other measures:

- Broad application, including to law enforcement uses: The Draft Memorandum applies to all new and existing AI that is developed, used, or procured by or on behalf of covered agencies,[47] and requires federal agencies to take additional steps (discussed further below) to address the risks of "safety-impacting" or "rights-impacting" AI. "Rights-impacting" AI is presumed to encompass technologies that control or meaningfully influence law enforcement and decisions in the criminal legal system; the exercise of protected speech; access to education, including school admissions and student discipline; access to housing, including tenant screening and home valuation; the terms and conditions of employment; and access to financial services and credit.[48] While we believe this list should be expanded, as discussed further below, we applaud the otherwise broad definition of "rights-impacting" AI, particularly the necessary inclusion of law enforcement and criminal legal system technologies. The dangers associated with the use of AI in these contexts are among the most concerning, potentially depriving individuals of liberty and endangering their housing, employment, and their ability to parent their children and care for their loved ones. Because of ongoing systemic discrimination against communities of color by law enforcement and the criminal legal system, Black and Brown communities often bear the brunt of these harms.

- Required risk management practices: The Draft Memorandum requires federal agencies to implement the minimum practices for safety-impacting or rights-impacting AI and to stop using any AI that is not compliant with those practices.[49] These minimum practices include steps such as completing an AI risk assessment that identifies the possible risks of using AI and evaluates the quality and appropriateness of the data used in the AI's design, development, and deployment; conducting real-world testing and independent evaluation of AI documentation; performing ongoing monitoring; and mitigating risks to rights and safety at every stage of design, development, and deployment.[50] Additionally, agencies must take additional steps to ensure that rights-impacting AI do not exhibit algorithmic bias, including by proactively identifying and removing factors contributing to algorithmic discrimination or bias; assessing and mitigating disparate impacts; using representative data; and consulting with impacted communities. Importantly, the Draft Memorandum reiterates throughout that federal agencies should not use AI that cannot meet these minimum requirements.

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[47] OMB Memo, *supra* note 1, at 3.
[48] *Id.* at 12-13.
[49] *Id.* at 10.
[50] *Id.* at 15-17.

- Increased transparency: The Draft Memorandum requires federal agencies "to identify and report additional detail on how they are using safety-impacting and rights-impacting AI, the risks—including risks to equity—that such use poses, how they are managing those risks, and any related extensions and waivers granted."[51] The federal government has an obligation to ensure that it can be held accountable for its actions through the democratic process. Yet the public is often not aware of when AI is used or the risks it poses, even if they themselves have been impacted by those systems. Requiring federal agencies to disclose their use of AI and the risks to equity they pose will provide needed transparency.

We applaud OMB for proposing these requirements, which would help the federal government begin to put the Blueprint for an AI Bill of Rights into practice. If strengthened and effectively implemented, the Draft Memorandum would help the federal government fulfill its nondiscrimination obligations and could provide a model for other governments seeking to strengthen their AI governance.

**III.     To Fully Realize Its Promise and Ensure that Civil Rights Are the Highest Priority, OMB Needs to Tighten Its Guidance and Build Capacity for Implementation.**

While the Draft Memorandum includes many important measures, it should be further strengthened in order to help the federal government's use of AI does not violate civil rights and civil liberties. We recommend that OMB: 1. clarify that algorithmic discrimination is unacceptable, but collecting demographic data to assess AI systems for bias and implementing AI systems that effectively increase access to opportunity are not forms of discrimination; 2. increase agencies' budgets to support compliance with testing requirements and other risk-management practices; 3. apply the Final Memorandum to AI systems funded by federal grants and to technology procured from third parties; 4. offer clear guidance to agency staff implementing anti-discrimination testing requirements; 5. mandate that CAIOs have civil rights expertise; 6. expand the definition of what constitutes AI and "rights-impacting" AI; 7. require disclosure of information about waivers granted to specific AI systems and documentation of agencies' risk-assessment procedures; 8. significantly limit when and how waivers can be granted; and 9. ensure that civil rights principles inform agencies' adoption of AI tools, and that federal agencies are required to consult with civil rights organizations and impacted communities on their AI strategies.

A. *Clarify that No Amount of Algorithmic Discrimination is Acceptable, but that Efforts to Assess Bias and Expand Opportunity Are Not Discrimination*

The Draft Memorandum should make clear throughout that no amount of unjustified algorithmic discrimination is acceptable. At the same time, the Draft Memorandum should make clear that federal agencies may collect and use data on race and other protected characteristics to

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[51] *Id.* at 4.

assess systems for bias, and that systems that effectively increase access to opportunity do not violate the Memorandum's requirements.

As currently defined, the Memorandum explains that "where the AI's risks to rights or safety exceed an acceptable level and where mitigation is not practicable, agencies must stop using the affected AI as soon as is practicable."[52] The Draft Memorandum also requires that federal agencies assess rights-impacting AI to "determine whether there are significant disparities in the AI's performance across demographic groups, and, consistent with applicable law, appropriately address disparities" and "[w[here sufficient mitigation of [AI-enabled discrimination] is not possible, agencies must safely discontinue use of the affected AI functionality."[53] However, the Draft Memorandum does not define what is an "acceptable level" of risk to rights and safety or "sufficient mitigation" of discrimination. Moreover, the Draft Memorandum does not define what "AI-enabled discrimination" by rights-impacting AI includes.[54]

Federal government use of AI should serve as an example to both state and local governments and the private sector and should be held to the highest standards. Existing civil rights laws should be viewed as the floor but not the ceiling for nondiscrimination protections. The Final Memorandum should make it clear that no amount of algorithmic discrimination is "acceptable." The Final Memorandum should also require federal agencies to identify and adopt less discriminatory alternatives even if those alternatives appear to impose material costs or perform slightly worse.[55] Finally, the Final Memorandum should use the term "algorithmic bias," which is defined in the Memorandum and appropriately includes both disparate treatment and disparate impact,[56] consistently throughout, rather than the undefined term "AI-enabled discrimination."

In addition, the Final Memorandum should also make clear how federal agencies can assess bias and enhance equity in federal systems consistent with its requirements. The Final Memorandum should state explicitly that data on race and other protected characteristics can be collected and used to determine whether a system exhibits algorithmic discrimination. In some cases, this analysis could require federal agencies to collect additional demographic data or improve their methods for collecting such data. Moreover, the Final Memorandum should make clear that AI systems that increase access to opportunity would not violate the memo's requirements provided they are consistent with existing law. For example, a federal agency could

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[52] *Id.* at 17.

[53] *Id.* at 18, 20.

[54] *Id.* at 20.

[55] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,473. (Feb. 15, 2013); 88 Fed. Reg. 19450, 19491 (Mar. 31, 2023); codified at 24 C.F.R. 100 (rejecting a proposal that less discriminatory alternatives must be "equally effective.").

[56] OMB Memo, *supra* note 1, at 22 (The term "algorithmic discrimination" has the meaning established in Section 10(f) of Executive Order 14091 of February 16, 2023.); Executive Order 14091 § 10(f) ("The term 'algorithmic discrimination' refers to instances when automated systems contribute to unjustified different treatment or impacts disfavoring people based on their actual or perceived race, color, ethnicity, sex (including based on pregnancy, childbirth, and related conditions; gender identity; intersex status; and sexual orientation), religion, age, national origin, limited English proficiency, disability, veteran status, genetic information, or any other classification protected by law.").

use an AI system to expand the pool of job applicants to ensure that Black people and other people of color have equal opportunity to compete for positions. Alternatively, a federal agency could expand the criteria used to evaluate loan applications in order to ensure that they do not unfairly exclude Black borrowers.[57]

## B. *In-house Capacity for Implementation*

The Draft Memorandum imposes needed requirements on federal agencies to ensure that their AI systems comply with minimum risk management practices. These requirements must be met by August 1, 2024, unless the agencies request "an extension of limited and defined duration for a particular use of AI that cannot feasibly meet the minimum requirements in this section by that date . . . accompanied by a detailed justification for why the agency cannot achieve compliance for the use case in question and what practices the agency has in place to mitigate the risks from noncompliance, as well as a plan for how the agency will come to implement the full set of required minimum practices from this section."[58] The Draft Memorandum also encourages agencies to take steps to fill gaps in their AI workforce using available special hiring and retention authorities.[59]

In order to meet the benchmarks and timelines established by the Memorandum, many federal agencies will need to significantly increase their technical capacity. We urge OMB to ensure that future budget requests account for the need to support compliance with the minimum risk-management practices, and that investments in new AI systems do not exceed agencies' capacity to evaluate them. The Final Memorandum should also specify that agencies should seek to hire additional staff with civil rights expertise in addition to technical expertise in order to ensure that the development and implementation of agencies' AI strategy and minimum risk-management practices are informed by experts who understand agencies' legal obligations.

In addition, the Final Memorandum should clarify the circumstances under which agencies can request an extension of the compliance deadline. OMB should only permit agencies to request extensions if AI evaluations are in progress according to a realistic timeline. If agencies do not have the capacity to complete testing requirements, they should not be allowed to keep requesting extensions and to continue to use the AI technology in the meantime. In that case, agencies should

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[57] For example, both Freddie Mac and Fannie Mae now give borrowers and lenders the option of submitting rental payment history for consideration as part of the entities' automated mortgage underwriting system. *Freddie Mac Takes Further Action to Help Renters Achieve Homeownership*, FREDDIE MAC (Jun. 29, 2022 10:00 ET), https://www.globenewswire.com/news-release/2022/06/29/2471417/0/en/Freddie-Mac-Takes-Further-Action-to-Help-Renters-Achieve-Homeownership.html; *FHFA Announces Inclusion of Rental Payment History in Fannie Mae's Underwriting Process*, FED. HOUSING FINANCE AGENCY (Aug. 11, 2021), https://www.fhfa.gov/mobile/Pages/public-affairs-detail.aspx?PageName=FHFA-Announces-Inclusion-of-Rental-Payment-History-in-Fannie-Maes-Underwriting-Process.aspx. The hope is that this additional information will help expand access to credit and homeownership among people of color, whom Fannie Mae found "are disproportionately represented among the 20% of the U.S. population having little to no established credit history." Hugh R. Frater, Fannie Mae, *Helping Renters Unlock the Door to Homeownership* (Aug. 11, 2021), https://www.fanniemae.com/research-and-insights/perspectives/helping-renters-unlock-door-homeownership.

[58] OMB Memo, *supra* note 1, at 14.

[59] *Id.* at 9.

be required to stop using the AI technology until they have capacity to run audits internally or to hire third-party auditors. These third-party auditors must have expertise in civil rights rather than embracing an AI-first approach.

## C. *Federal Grants*

The Draft Memorandum currently only applies to AI used by federal agencies. It does not require that AI systems funded with federal dollars or created pursuant to federal mandates comply with the same minimum risk-management practices. However, the Department of Justice has created funding programs such as its "Smart Policing Initiative" (SPI) and provided grants for biased and discriminatory technologies such as predictive policing with little to no tracking.[60]

Federal funding should not be used to support AI systems that the federal government could not itself use. To the greatest extent allowed by law, federal agencies should ensure that grant funding programs such as the SPI and federally-funded AI systems comply with the minimum risk-management practices outlined in the memo. At minimum, federal agencies should consider issuing guidance or best practices to federal funding recipients.

## D. *Procurement*

The current Draft Memorandum mandates that, within 180 days, "the [interagency] council described in Section 10.1(a) of the AI Executive Order [which includes the heads of all cabinet-level federal agencies] will provide the Director of OMB with a list of recommended documentation that should be required from a selected vendor in the fulfillment of a Federal AI contract. As part of their recommendation, the council must consider the minimum risk management practices in Section 5(c) and the associated materials that may be required of vendors to demonstrate that they have completed such tasks."[61]

AI used by federal agencies should comply with the same standards regardless of whether it is developed internally or procured from outside companies. In addition to requiring documentation relevant to risk management from third parties, the Final Memorandum must require that technology procured from third parties complies with the outlined minimum risk-management practices.

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[60] Dell Cameron, *Justice Department Admits: We Don't Even Know How Many Predictive Policing Tools We've Funded*, GIZMODO (Mar. 17, 2022), https://gizmodo.com/justice-department-kept-few-records-on-predictive-polic-1848660323 ("While entrusted with overseeing grants for state and local law enforcement agencies, Justice Department officials have kept no 'specific records,' a senior official has said, with regard to which agencies have tapped a leading source of DOJ funding to purchase predictive policing tools."); *Pasco County Sheriff's Office intelligence program to receive 'intensive review' by Department of Justice bureau*, 10 TAMPA BAY (Sept. 10, 2021), https://www.wtsp.com/article/news/local/pascocounty/pasco-county-sheriffs-office-intelligence-program-review-department-of-justice/67-73d9b829-e92d-4daf-bfe0-c6686820d675 (grant for "Focused Deterrence Program" provided through Smart Policing Initiative).
[61] *Id.* at 10.

E.  *Anti-discrimination Testing*

Currently, the Draft Memorandum imposes "Additional Minimum Practices for Rights-Impacting AI" only apply to rights-impacting AI, not safety-impacting AI. These additional minimum practices include "tak[ing] steps to ensure that the AI will advance equity, dignity, and fairness,"; "consult[ing] and incorporating feedback from affected groups"; conduct[ing] ongoing monitoring and mitigation for AI-enabled discrimination"; "notify[ing] negatively affected individuals"; "maintain[ing] human consideration and remedy processes"; and "maintain[ing] options to opt-out where practicable."[62] Moreover, the Draft Memorandum appears to leave it to the agencies to decide which agency staff members are in charge of these testing requirements and which testing methodologies to use.

Given that several of the safety-impacting use cases can have serious consequences for the individual and community rights described in the Memorandum's definition of rights-impacting AI,[63] the Final Memorandum should require the additional minimum practices for all safety-impacting AI as well as all rights-impacting AI. At minimum, the Final Memorandum should clarify that, if a technology could be categorized as either rights-impacting or safety-impacting, agencies should apply the additional requirements for rights-impacting systems.

In order to facilitate consistent implementation across agencies, the Final Memorandum should also specify which actors are responsible for completing the testing requirements, and agencies should publicly report which anti-discrimination testing methodologies they are using. Agencies should choose testing methodologies based on input from experts on bias and discrimination in particular contexts in order to account for the ways these issues manifest in different arenas. In addition to assessing whether AI systems produce biased results, the Final Memorandum should also require agencies to assess whether they will deploy AI systems in a way that disproportionately burdens particular communities. For example, surveillance systems that are deployed more frequently in communities of color can chill the exercise of free speech, decrease privacy, and cause other harms in addition to any bias in the results produced by the system. The Final Memorandum should require agencies to mitigate those harms or stop using those systems. Finally, the White House Office of Science and Technology Policy and the National Institute for Science and Technology should provide agency staff responsible for implementing the memo with clear guidance, informed by public input—for example, guidance on acceptable testing and tolerances.

F.  *Chief AI Officers*

The current Draft Memorandum requires the head of each agency to designate a CAIO responsible for coordinating agency use of AI, promoting AI innovation, and managing risks from the use of AI. The CAIO "must have the necessary skills, knowledge, training, and expertise to

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[62] *Id.* at 18-21.
[63] *Id.* at 24.

perform the responsibilities described,"[64] which include identify rights-impacting and safety-impacting systems and managing the risks of those systems.[65] As such, the Final Memorandum must specifically state that CAIOs should have expertise in civil rights.

G. *AI Use Case Inventory*

The Draft Memorandum currently states that agencies must publicly report AI use cases "to the extent consistent with applicable law and government guidance, including those concerning protection of privacy and of sensitive law enforcement, national security, and other protected information," should make this documentation accessible to potentially impacted communities "where practicable," and should report relevant information to OMB about excluded use cases "as appropriate" and "consistent with applicable law and governmentwide guidance, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information."[66]

We urge OMB to tighten this language lest the exceptions swallow the rule. Law enforcement technologies should be disclosed publicly in the AI use case inventory, information about them should be made explicitly available to potentially impacted communities, and details on excluded use cases should be provided to OMB and should follow transparency requirements. Because law enforcement technologies can cause some of the most significant harms to impacted communities, there is a heightened need for transparency about these systems. As discussed further below, the Final Memorandum should also require agencies to publish additional information about waivers that exempt AI systems from the minimum risk-management requirements. Finally, the Final Memorandum should require federal agencies to publish all documentation produced as part of the minimum risk-assessment procedures (i.e., the impact assessment, results of real-world testing, etc.) as part of their use case inventory.

H. *Definitions*

While the Draft Memorandum's definitions of AI and systems that are presumed to be "rights-impacting" or "safety-impacting" encompass many critical technologies, they also exclude some systems that have significant civil rights implications. We urge OMB to expand and clarify these definitions in the Final Memorandum.

First, the Draft Memorandum uses a different definition of AI than the Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.[67] OMB should clarify that AI for the purposes of the memo is a machine-based system that can, for a given set of

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[64] *Id.* at 4-7.
[65] *Id.* at 6.
[66] *Id.* at 4.
[67] *Compare id.* at 22 *with* Executive Order 14110 on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (Oct. 30, 2023), 88 Fed. Reg. 75191 (Nov. 1, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-01/pdf/2023-24283.pdf (AI EO).

human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments.

Second, the Draft Memorandum "encourage[s]" but does not require elements of the intelligence community to implement the outlined risk management practices for rights-impacting and safety-impacting AI.[68] The Department of Defense and the Intelligence Community are also exempt from submitting an AI use case inventory to OMB and publicly disclosing a version on their website.[69] Under the Final Memorandum, the exclusion of the intelligence community should not be used to dismiss civil rights protections for law enforcement uses of AI.

I.  *Waivers*

The Final Memorandum should provide additional constraints on when and how federal agencies can exempt AI systems from the minimum risk-management requirements and should create additional transparency regarding when and how waivers should be granted. The Draft Memorandum currently allows agencies' CAIOs to waive one or more of the minimum risk-management requirements "after making a written determination, based upon a system-specific risk assessment, that fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations."[70] Such waivers would be in effect for the duration of the AI's use.[71] This provision creates a significant loophole that could undermine the principles outlined in the Blueprint for an AI Bill of Rights and permit the federal government to knowingly or unknowingly engage in algorithmic discrimination in violation of its statutory and constitutional obligations.

The Final Memorandum should significantly limit when and how waivers exempting systems from the minimum risk-management requirements can be granted. The Final Memorandum should clearly define and limit what constitutes "an unacceptable impediment to critical agency operations" and specify that a waiver should not be granted if there is a risk that such a waiver would create a risk that the agency's use of AI would violate the Due Process Clause, the Equal Protection Clause, or any other constitutional or statutory right. The memo should explicitly require the CAIO to get consent from the Civil Rights Division at the Department of Justice and any relevant civil rights officers at their agency before granting a waiver. Waivers should only be granted for a limited period of time (i.e., one year) and should be periodically reassessed *de novo*. Federal agencies should also be required to publish information in their AI case inventory regarding why a waiver was requested, why it was granted, and when the waiver must be reevaluated.

Finally, the proposed rule permits the CAIO "to determine that an AI application does not match the definitions of 'safety-impacting AI' or 'rights-impacting AI' and is therefore not subject

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[68] OMB Memo, *supra* note 1, at 10.
[69] *Id.* at 4.
[70] *Id.* at 14.
[71] *Id.*

to the minimum practices."[72] The Final Memorandum should similarly require the CAIO to get consent from the Civil Rights Division at the Department of Justice and any relevant civil rights officers at their agency before granting a waiver; to periodically review this determination based on information regarding the use of the system; and to disclose regarding why this determination was made and when it must be reevaluated.

J. *AI Strategies*

The Draft Memorandum requires CAIOs to develop AI strategies for each federal agency, and currently places significant emphasis on increasing federal agencies' adoption of AI tools, devoting an entire section to improving their ability to use and procure AI.[73] However, as described in Section I above, AI systems pose significant risks to civil rights and can rapidly harm numerous individuals. As such, the federal government must be thoughtful about AI adoption.

The Final Memorandum should require agencies, as part of the development of their AI strategies, to carefully evaluate whether and how AI tools—particularly safety-impacting and rights-impacting AI—would actually add value compared to a human alternative before adopting them. The Final Memorandum should also make clear that the principles embodied in the minimum risk-assessment requirements are not separate from agencies' AI strategies but should inform those strategies. In order to ensure that federal agencies carefully balance the civil rights risks of AI against any possible benefits, the Final Memorandum should require federal agencies to consult with civil rights organizations and impacted communities as they develop their AI strategies. Finally, the Final Memorandum should ensure that federal civil rights officials play a central role in the development of AI strategies. The 2023 Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence recognizes the importance of civil rights officials in developing AI policy and directs the "Assistant Attorney General in charge of the Civil Rights Division to convene . . . a meeting of the heads of Federal civil rights offices to discuss comprehensive use of their respective authorities and offices to . . . prevent and address discrimination in the use of automated systems, including algorithmic discrimination," among other topics.[74] The results of those conversation should also inform each agencies' AI strategies. In line with the EO, the Final OMB Memorandum should require CAIOs to consult with the Civil Rights Division and federal civil rights offices.

IV. **Conclusion**

Discrimination due to AI systems is prevalent across a variety of sectors and can cause significant harm to affected communities, the entities that use AI, and society as a whole. We appreciate the OMB Memorandum's provisions to strengthen civil rights protections against AI-related harms, but we urge OMB to tighten its guidance and build capacity for implementation in order for the Memorandum's promises to be fully realized.
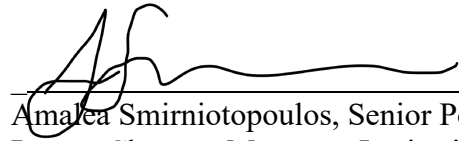
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[72] *Id.* at 11.
[73] *Id.* § 4.
[74] AI EO, *supra* note 71, § 7.1(a)(ii).

Thank you for the opportunity to comment. If you have any questions, please contact Amalea Smirniotopoulos, Senior Policy Counsel, at asmirniotopoulos@naacpldf.org; Puneet Cheema, Manager, Justice in Public Safety Project at pcheema@naacpldf.org; and Avatara Smith Carrington, Strategic Initiatives Law & Policy Fellow, at acarrington@naacpldf.org.

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