August 3, 2023

The Honorable Kamala Harris
Vice President of the United States
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Via email

RE: Centering Equity, Safety, and Non-Discrimination in an Executive Order on AI

Dear Vice President Harris:

We thank the White House for its attention to artificial intelligence ("AI") and other automated technologies. As you know, the ACLU has been a guardian of our nation's liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. This work has long included fighting against discriminatory uses of technology and data. We are deeply appreciative of the White House's leadership in this space and as the White House considers an Executive Order on AI, we urge you to continue to center equity, safety, and non-discrimination in your efforts.

The harms from AI to safety and equity have been well documented:

- Within the housing sector, tenant screening algorithms have all too often amplified and exacerbated existing racial, gender, disability, economic, and intersectional inequities in accessing housing.[1] These systems purport to make predictions about who will be a successful tenant by analyzing credit scores, legal records, previous housing history, and information from data brokers and other sources. Instead, as highlighted in a recent report by the Consumer Financial Protection Bureau, these systems are prone to algorithmic errors and discrimination,

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[1] Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back from Tough Times*, Consumer Reports (Mar. 11, 2021), here.

which disproportionately impact Black and Latine applicants, with devastating effects for consumers' ability to access housing.[2] Moreover, because of the "black box" nature of these systems and insufficient notice to impacted people when they are utilized, it is often difficult or impossible for people to learn about housing discrimination due to these algorithms.[3]

- Ninety-nine percent of Fortune 500 companies are using AI or other automated systems in the hiring process to screen and advance candidates,[4] which are disproportionately used for lower wage jobs in sectors like retail, logistics, and food services.[5] These systems may take the form of automated resume analysis, personality tests, or even algorithmic analysis of candidates' facial expressions and tone of voice during an interview.[6] Even when the systems have had explicit use of race, gender or other protected characteristics removed, they nonetheless make proxy-based correlations that discriminate on these same bases.[7]

- Law enforcement agencies across the country have deployed algorithmic systems such as facial recognition technology and predictive policing systems, often with harmful results. For example, facial recognition algorithms have been shown to

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[2] Consumer Financial Protection Bureau, *Consumer Snapshot: Tenant Background Checks* 21 (2022), here.

[3] *See, e.g.*, Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, No. 3:18-cv-705, 2023 WL 4669482 (D. Conn. July 20, 2023) at *9–10, *23–25 (describing adverse action letter provided to applicant that does not disclose the basis for the applicant's denial except to inform that the denial is based on the relevant company's screening report and holding screening company liable under the Fair Credit Reporting Act for willfully failing to make it possible to request a consumer report).

[4] Joseph B. Fuller et al., *Hidden Workers: Untapped Talent*, Harvard Business School & Accenture 20 (2021), here.

[5] Patrick Thibodeau, *Food Industry Turns to AI Hiring Platform to Fill 1M Jobs*, TechTarget (Apr. 9, 2020), here.

[6] Aaron Rieke & Miranda Bogen, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, Upturn 26, 29, 36 (Dec. 10, 2018), here.

[7] Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 Cal. L. Rev. 671, 729-32 (2016), here; see also Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, Conference on Fairness, Accountability and Transparency, 81 Proceedings of Machine Learning Research. 1 (2018), here; Allison Koenecke et al., *Racial Disparities in Automated Speech Recognition*, 117 Proceedings of the National Academy of Sciences 7684, 7684 (2020), here; Dave Gershgorn, *Companies Are on the Hook if their Hiring Algorithms Are Biased*, Quartz (Oct. 22, 2018), here.

have higher false match rates when used to try to identify people of color.[8] To date, there are at least five known cases of Black men being wrongfully arrested and jailed based on police reliance on faulty facial recognition "matches."[9] Likewise, predictive policing algorithms rely on data — such as arrest rates — that has baked into it the over-surveillance and disparate policing of communities of color.[10]

- U.S. intelligence agencies and the military are seeking to integrate AI into some of the government's most profound decisions: who it surveils, who it adds to government watchlists, who it labels a "risk" to national security, and even who it targets using lethal weapons.[11] In many of these areas, the deployment of AI already appears to be well underway. But the public knows almost nothing about the systems that agencies like the FBI, Department of Homeland Security, CIA, and National Security Agency are developing or using, and even less about the safeguards that exist to ensure fairness, equal treatment, privacy, and due process — if any.[12]

This list is by no means exhaustive. Even within these four sectors, there are many more harms stemming from AI and other automated technologies. Across both the private and public sectors, the harms from inequitable, unsafe, and discriminatory AI affect individuals in credit, education, healthcare, law enforcement, immigration, and more.[13]

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[8] National Institute of Standards & Technology, Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects (NISTIR 8280) (2019), here.

[9] *See* Kashmir Hill & Ryan Mac, *'Thousands of Dollars for Something I Didn't Do'*, N.Y. Times (Mar. 31, 2023), here; Khari Johnson, *Face Recognition Software Led to His Arrest. It Was Dead Wrong.*, Wired (Feb. 28, 2023), here; Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, N.Y. Times (Dec. 29, 2020), here; Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. Times (Aug. 3, 2020), here; Elisha Anderson, *Controversial Detroit Facial Recognition Got Him Arrested for a Crime He Didn't Commit*, Detroit Free Press (July 10, 2020), here.

[10] *See e.g.*, Will Douglas Heaven, *Predictive Policing Algorithms Are Racist. They Need to be Dismantled*, MIT Technology Review (2020), here; Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. Rev. 15 (2019), here.

[11] *See, e.g.*, National Security Commission on Artificial Intelligence, Final Report at 81, 109–10 (2021), here.

[12] *See id.* at 141–54, 395–410.

[13] *See, e.g.*, Comments of the American Civil Liberties Union to the Federal Trade Commission and Consumer Financial Protection Bureau (May 31, 2023), here; Testimony

The White House can — and should — lead in addressing harms that *are occurring now*, including through the forthcoming Executive Order on AI. In crafting an Executive Order that ensures AI is equitable, safe, and non-discriminatory, the White House is not writing on a blank slate, but building on an existing foundation, including the Office of Science and Technology Policy's Blueprint for an AI Bill of Rights and the National Institute of Standards and Technology's Risk Management Framework. The White House's Executive Order should build on this foundation and make these principles binding.

Critically, the White House must ensure that the Executive Order operationalizes the five pillars of the Blueprint for an AI Bill of Rights in the federal government's development, procurement, funding, use, regulation, and deployment of AI and automated technologies. Consistent with the Blueprint, the Executive Order should require proactive measures throughout the entirety of an AI lifecycle such as: consultation; pre- and post-deployment testing for discrimination, safety, and effectiveness, and mitigation or decommissioning when necessary; independent and transparent auditing and reporting; privacy protection measures; notice and recourse measures for impacted individuals; and human consideration and fallback. These goals should apply across the government, including law enforcement and intelligence agencies, and across the private sector, especially where the use of AI and other automated technologies can negatively impact critical life opportunities.

The White House can effect these goals through several of its Executive Branch authorities:

- **Direct agencies to develop and implement robust enforcement plans targeting discriminatory uses of AI in violation of existing civil rights laws.** It is critical that the Executive Branch use the full force of its enforcement powers to proactively investigate and address discriminatory uses of AI and automated technologies. Many agencies are already empowered by broad civil rights laws to address discrimination by public and private entities in employment, credit, housing, education, and other areas, and some agencies

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of ReNika M. Moore, American Civil Liberties Union, before the U.S. Equal Employment Opportunity Commission (Jan. 31, 2023), here; Comments of the American Civil Liberties Union to the Federal Trade Commission (Dec. 1, 2022), here.

have begun to take enforcement actions. For example, the Department of Justice recently settled a suit against Meta Platforms, Inc., for its discriminatory algorithmic targeting of housing ads in violation of the Fair Housing Act, and the Equal Employment Opportunity Commission ("EEOC") included addressing discrimination in the use of automated systems and screening tools as a subject matter priority in the draft of its Strategic Enforcement Plan for 2023–2027.[14] But many agencies have not yet prioritized enforcing civil rights laws when automated tools are used; they have likewise not developed or implemented plans updating enforcement strategies in light of the particular complexity and "black box" nature of these tools. The White House should direct federal agencies charged with enforcing civil rights laws to develop and implement robust enforcement plans targeting discriminatory uses of AI. The White House should also direct the Office of Management and Budget ("OMB") to update its November 17, 2020 Guidance for Regulation of Artificial Intelligence Applications[15] to center equity, safety, and non-discrimination.

● **Providing guidance and best practice standards.** In addition to bringing enforcement actions where appropriate, the White House should direct agencies to issue guidance to alert private entities to their responsibilities under existing law. Some agencies have begun to issue such guidance, such as EEOC guidance to employers under Title VII[16] and the Americans with Disabilities Act[17] and Federal Trade Commission ("FTC") guidance on how the use of hidden algorithms to deprive workers of bargaining power or compensation may run afoul of the prohibition on unfair or

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[14] Department of Justice, Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook, to Resolve Allegations of Discriminatory Advertising (June 21, 2022), here; U.S. Equal Employment Opportunity Commission, Draft Strategic Enforcement Plan, 88 Fed. Reg. 1379 (Jan. 10, 2023), here.
[15] Office of Management and Budget, Guidance for Regulation of Artificial Intelligence Applications, M-21-06 (2020), here.
[16] Equal Employment Opportunity Commission, Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964 (May 18, 2023), here.
[17] Equal Employment Opportunity Commission, The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (May 12, 2022), here.

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deceptive acts and practices.[18] Although these and similar documents are important steps,[19] far more is needed. Moreover, the White House should direct agencies to provide comprehensive standards or best practices for the industries they regulate for assessments and auditing of AI and other automated systems. To help ensure that discriminatory and unfair uses of AI are addressed *before* they occur, AI and other automated technologies should be subject to robust audits and assessments throughout their lifecycle — from development to deployment and discontinuance — with proactive searches and adoption of less discriminatory alternatives and consultation with impacted communities. In light of those audits, AI systems that pose a particularly high risk of discrimination, especially in use cases impacting fundamental rights or core areas of life, should not be adopted or should be terminated if already deployed. Agencies have a key role to play in requiring or encouraging such assessments and setting a baseline for what assessments entail and when mitigation or decommission measures should be employed. Agencies should likewise set standards and best practices for providing meaningful notice and recourse to impacted individuals, for human alternatives and opt out processes, and for protecting privacy.

● **Using procurement and spending authorities to ensure that federal, state, and local use of AI and other automated technologies are equitable, safe, and non-discriminatory.** The White House should direct federal agencies to center equity, safety, and non-discrimination in their procurement and use of AI and other automated technologies. Federal law already requires the OMB to establish "policies regarding Federal acquisition and use" of AI and "best practices for identifying, assessing, and mitigating any discriminatory impact or bias on the basis of any classification protected under Federal non-discrimination laws."[20] The White House should ensure that the forthcoming OMB guidance requires federal agencies to likewise subject AI

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[18] Federal Trade Commission, Policy Statement on Enforcement Related to Gig Work (Sept. 15, 2022), here.

[19] *See also* Consumer Financial Protection Bureau et al., Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems (Apr. 25, 2023), here.

[20] AI in Government Act of 2020, Pub. L. No. 116-260, div. U, title I, § 104, 134 Stat. 1182, 2288 (Dec. 27, 2020).

and similar automated systems to audits and impact assessments throughout the entirety of their lifecycle, require consideration and adoption of less discriminatory alternatives and consultation with impacted communities, set standards for mitigation and termination, and ensure processes for providing notice and recourse to impacted individuals and accessing alternatives to automated systems. The White House should ensure that these policies are adopted not only for federal use or procurement of AI, but also for AI used by state and local programs that are supported by federal funds and subject to federal rules around civil rights, procurement, and accountability.

- **Conducting research and providing transparency around the development and deployment of AI and other automated technologies.** The Executive Branch should direct agencies to conduct studies and issue reports on the use of AI and other automated technologies in both the public and private sectors. AI uses are often hidden from view, and the lack of information in the public sphere hampers accountability. Agencies should explore ways to require or encourage transparency around the uses of AI and automated systems and what they purport to measure, the data they rely on, and the manner in which they have been tested and the results of such testing. Some statutes explicitly provide agencies with authority to conduct research. For example, under Title VII, the EEOC is empowered to "make such technical studies as are appropriate to effectuate the purposes and policies of [Title VII] and to make the results of such studies available to the public," and similar authority is granted under the ADA.[21] The FTC may similarly use its authority under Section 6 of the Federal Trade Commission Act to better understand the use of AI and other automated technologies by specific entities or across entire industries.

Thank you for your consideration, and please feel free to contact the following staff with any questions: Olga Akselrod, Senior Staff Attorney at oakselrod@aclu.org and Cody Venzke, Senior Policy Counsel at cvenzke@aclu.org.

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[21] 42 U.S.C. § 2000e-4(g)(5); 42 U.S.C. § 12117(a).

Sincerely,

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CC   Jeff Zients, Chief of Staff to the President
Lorraine Voles, Chief of Staff to the Vice President
Arati Prabhakar, Director and Assistant to the President for
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