



**Civil Rights Implications of the Federal Use of Facial Recognition
Technology**

Testimony of

**Dr. Michael Akinwumi
Chief Responsible AI Officer
National Fair Housing Alliance
1331 Pennsylvania Ave., NW; Suite 650
Washington, DC 20004
www.nationalfairhousing.org**

Before the

**U.S. Commission on Civil Rights
March 8, 2024**

Introduction

Chairwoman Garza, Vice Chairwoman Nourse, and other distinguished members of the U.S. Commission on Civil Rights (the Commission), thank you for the opportunity to testify during the hearing on civil rights implications of the Federal use of facial recognition technology (FRT). Facial recognition technology, if used responsibly and ethically, can offer enhanced security and efficiency in housing by streamlining access control, aid law enforcement in identifying suspects and finding missing persons and contribute to the administration of justice by supporting accurate identification and verification processes in judicial proceedings. Yet, it poses civil rights risks and challenges such as potential racial bias in misidentification, invasion of privacy, and unwarranted surveillance, which can lead to discrimination in housing, unjust law enforcement practices, and miscarriages of justice. The Commission can play a pivotal role in navigating the complexities of facial recognition technology (FRT), ensuring the United States leads in responsible and ethical technological innovation. It's imperative for the Commission to formulate robust policy recommendations and innovative guardrails to protect Americans from real or perceived risks associated with FRT, aligning with its commitment to fostering a secure and equitable technological landscape.

The National Fair Housing Alliance® (NFHA™) is the country's only national civil rights organization dedicated solely to eliminating all forms of housing and lending discrimination and ensuring equal opportunities for all people. As the trade association for over 170 fair housing and justice-centered organizations throughout the U.S. and its territories, NFHA works to dismantle longstanding barriers to equity and build resilient, inclusive, well-resourced communities where everyone can thrive.

NFHA's Evolution in Addressing Civil Rights Risks of FRT & Description of NFHA's Responsible AI Program

NFHA has addressed harms associated with automated systems, an umbrella term for technologies such as FRT, Machine Learning (ML), and Reinforcement Learning which are examples of Artificial Intelligence (AI), since its inception in 1988. We first concentrated our efforts on prohibiting or restricting the use of discriminatory automated systems such as credit and insurance scoring, underwriting, and pricing models, in housing and financial services. Early settlements with entities like Prudential, State Farm, Nationwide, and Allstate addressed these discriminatory systems. Several years ago, while litigating a major case against then-Facebook, it became even more clear that technology, including AI, was the new civil and human rights frontier and, as a civil rights organization, we had to be a leader in this sector.

Thus, we established our Responsible AI Lab with an initial focus on Tech Equity. The lab is comprised of researchers and engineers committed to civil and human rights principles and is headed by one of the world's premier AI Research Scientists, Dr. Michael Akinwumi. NFHA's Responsible AI Lab has five workstreams founded on each of the following technical and policy research pillars:

- **Tech Equity:** We focus on developing and advocating for methodologies that ensure automated systems offer equitable access to housing opportunities.
- **Data Privacy:** We strive to test and promote technologies that balance consumer privacy with the need for data access to eliminate bias in automated systems.

- **Explainability:** We advocate for consumers' right to explanations for automated decisions and work to test and promote methodologies that clarify the reasoning or design behind automated systems.
- **Reliability:** We focus on testing and advancing techniques to ensure only safe and valid automated systems are used in housing applications.
- **Human-Centered Alternative Systems:** We work on advancing technical and policy solutions to determine when human-centered alternatives should take precedence over automated systems in housing decisions, particularly when data quality is poor, infrastructure is inadequate, or there is a lack of social awareness about harms of automated systems.

Since launching our Responsible AI work, NFHA has contributed to, advocated for, and created technical and policy solutions that advance responsible use of technologies in housing and lending. Some of the frameworks that seek to advance safe, secure and trustworthy development and use of AI include the AI risk management framework of the National Institute of Standards and Technology¹, the White House's AI Bill of Rights² and White House Executive Order on Artificial Intelligence.³ We have also developed a state-of-the-art framework for auditing algorithmic systems.⁴

The Genesis of Facial Recognition Technology

The evolution of facial recognition technology has been marked by significant milestones that transformed it from a theoretical concept to an advanced tool of modern technology. In the early days of 1964, American researchers Bledsoe et al.⁵ conceived the idea of a semi-automatic system that could recognize faces using manual measurements inputted by human operators. The technology saw improvements in 1977 with the addition of more distinguishing features, such as lip width and hair color, enhancing its accuracy. The incorporation of artificial intelligence in 1988 allowed the system to move beyond the constraints of human intervention, although it initially revealed many weaknesses. It wasn't until 1991 that MIT researchers Alex Pentland and Matthew Turk made a breakthrough with the Eigenfaces system,⁶ employing principal component analysis, a statistical method, to identify faces effectively.

The late 20th and early 21st centuries witnessed a rapid acceleration in the development and application of facial recognition technology. The Defense Advanced Research Projects Agency

¹ See National Institute Standards and Technology, *Artificial Intelligence Risk Management Framework* (January 2023), <https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>

² See White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* (Oct. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>.

³ See White House Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (Oct. 30, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>.

⁴ Michael Akinwumi, Lisa Rice, and Snigdha Sharma, *Purpose Process, and Monitoring: A New Framework for Auditing Algorithmic Bias in Housing and Lending*, National Fair Housing Alliance (2022), https://nationalfairhousing.org/wp-content/uploads/2022/02/PPM_Framework_02_17_2022.pdf.

⁵ Bledsoe, W.W. *The Model Method in Facial Recognition*. Panoramic Research, Inc. (1964)

⁶ Turk, M., & Pentland, A. *Eigenfaces for recognition*. *Journal of Cognitive Neuroscience*, 3(1), 71–86. (1991)

(DARPA) introduced the Face Recognition Technology (FERET)⁷ database in 1998 to catalyze further innovation, offering a challenging database of images for development. This period also saw competitive drives such as the Face Recognition Grand Challenge⁸ in 2005, which sought to support existing facial recognition technologies. However, it was the advent of deep learning⁹ in 2011 that truly revolutionized the field, leading to sophisticated systems like Facebook's DeepFace¹⁰ in 2014, which boasted near-human accuracy levels. These advancements have paved the way for widespread applications, from Apple's facial recognition in consumer devices to Mastercard's Selfie Pay, demonstrating the technology's versatile impact on our daily lives.¹¹

The Definition of FRT and How it Works

Facial Recognition Technology (FRT) is a type of biometric technology used to identify or verify individuals through their unique facial features. It encompasses several related processes: facial recognition itself (matching faces for identity confirmation), facial detection (simply locating faces within images), and facial analysis (estimating characteristics like age, gender, or race from a person's face). In this testimony, the definition of FRT is not limited to facial recognition itself, it includes both facial analysis and facial detection.¹²

FRT systems generally follow these steps to carry out their tasks.¹³ First, a photo or video frame containing a face is captured. Then, specialized software converts this image into a mathematical representation, a template highlighting distinctive facial features. Finally, comparisons are made. In verification (one-to-one), the template is matched against a single stored photo to confirm identity. In identification (one-to-many), the template is compared to a database of photos to find a potential match.

This technology serves many purposes, from enhancing security measures to streamlining identification processes in various sectors, including law enforcement and consumer applications. However, its deployment raises important considerations regarding privacy, accuracy, and ethical use, especially in handling sensitive personal data and ensuring fairness

⁷ Phillips, P. J., Wechsler, H., Huang, J., & Rauss, P. *The FERET database and evaluation procedure for face recognition algorithms*. *Image and Vision Computing*, 16(5), 295–306. (1998)

⁸ Phillips, P. J., Flynn, P. J., Scruggs, T., Bowyer, K. W., Chang, J., Hoffman, K., Marques, J., Min, J., & Worek, W. *Overview of the face recognition grand challenge*. In *Proceedings of the 2005 IEEE Computer Society Conference on Computer Vision and Pattern Recognition (CVPR'05)* (pp. 947–954). IEEE. San Diego, CA, USA. (2005)

⁹ Guo, G., & Zhang, N. *A survey on deep learning based face recognition*. *Computer Vision and Image Understanding*, 189, Article 10285. (2019)

¹⁰ Taigman, Y., Yang, M., Ranzato, M., & Wolf, L. *DeepFace: Closing the gap to human-level performance in face verification*. In *Proceedings of the 2014 IEEE Conference on Computer Vision and Pattern Recognition* (pp. 1701-1708). IEEE. Columbus, OH, USA. (2014)

¹¹ Taigman Y, Yang M, Ranzato M, Wolf L. *Deepface: Closing the gap to human-level performance in face verification*. In: *Proceedings of the 2014 IEEE Conference on Computer Vision and Pattern Recognition*; (2014 Jun 23-28); Columbus, OH. Pp. 1701-1708.

¹² See U.S. Government Accountability Office. *Facial Recognition CBP and TSA are Taking Steps to implement Programs, but CBP Should Address Privacy and System Performance Issues*. (2021). Retrieved from <https://www.gao.gov/assets/710/709176.pdf>; U.S. Government Accountability Office. *Facial Recognition Technology: Current and Planned Uses by Federal Agencies*. (2021). Retrieved from <https://www.gao.gov/assets/gao-21-526.pdf>.

¹³ U.S. Government Accountability Office. *Facial Recognition Technology: Federal Agencies' Use and Related Privacy Protections*. (2021). Retrieved from <https://www.gao.gov/products/gao-22-106100>.

across diverse populations. The development and implementation of FRT highlights the delicate balance between technological innovation and the imperative to safeguard individual rights and societal values.

FRT Use in Housing & Financial Services

The increasing adoption of facial recognition technology (FRT) holds transformative potential for sectors like housing and financial services. However, these applications raise profound ethical, legal, and privacy concerns that necessitate careful consideration and proactive policy measures. Some potential uses of FRT in housing and financial services include:

1. **Access Control in Housing Complexes:** FRT-equipped cameras can replace keycards or fobs to offer a 'frictionless' experience for approved tenants or residents. This could streamline access and reduce the need for physical identity verification.
2. **Security and Surveillance:** FRT can be used to identify known trespassers on a housing property, potentially aiding crime prevention efforts. Additionally, some landlords may deploy FRT for general surveillance within common areas.
3. **Tenant Verification for Financial Services:** Banks or lenders could utilize FRT for initial identity verification during the onboarding of new customers applying for financial products. This might mitigate certain types of fraud while adding a layer of convenience compared to in-person verification.
4. **Know-Your-Customer (KYC) Compliance:** FRT-assisted identity verification can support banks' compliance with KYC regulations, designed to prevent money laundering and illicit financing.
5. **Authentication for Transactions:** FRT could replace passwords or PINs, enabling customers to authenticate high-value financial transactions via facial scans.
6. **Fraud Detection in Financial Services:** FRT can be incorporated into fraud detection systems, identifying discrepancies between a person's face and known customer records. Deepfakes and other synthetic media might require specialized detection mechanisms.
7. **Emotion Detection within Housing Disputes:** FRT, which analyzes facial expressions to infer emotional states, has controversial potential in resident-landlord disputes, raising concerns about biased or manipulative applications.
8. **Marketing and Demographics Studies:** Retailers or financial institutions located within housing complexes could apply limited FRT to non-identifying demographic analysis to understand customer segments or dwell times.
9. **Personalized Experiences:** FRT could theoretically enable systems to recognize residents, offering customized greetings or adjusting ambient settings based on inferred preferences.

Civil Rights Concerns

FRT promises convenience and enhanced security, yet stories like those from Knickerbocker Village¹⁴ and Atlantic Plaza Towers¹⁵ highlight a darker reality. For residents, FRT means submitting to constant surveillance, with malfunctioning systems leading to denied access and potential identity theft risks. These cases illuminate how FRT infringes on fundamental rights to privacy and freedom of movement.

The Atlantic Plaza Towers incident reveals a troubling pattern: using FRT as a control mechanism, particularly targeting residents of color. Black women were labeled disruptive merely for spreading information, raising concerns about selective enforcement and the suppression of rights. These instances show how FRT can perpetuate existing power imbalances and erode the ability to freely engage in one's own community.

From biased algorithms to invasive data collection, the unchecked use of FRT poses serious threats to civil rights. Tenants facing scans as a condition of living exemplify a lack of autonomy in personal data use. Cases like these underscore how biases in FRT systems can lead to discriminatory treatment, particularly for communities of color. These examples are not isolated incidents. They expose a pattern of potential civil rights violations enabled by facial recognition technology, including:

1. Impact of FRT on civil liberties

FRT has profound implications for civil liberties, including the rights to privacy, free speech, and association. The omnipresence of FRT can transform public spaces into environments of constant surveillance, where individuals are tracked without consent.¹⁶ This pervasive monitoring risks chilling effects on free speech and assembly, as individuals may alter their behavior due to the fear of being watched.¹⁷ Moreover, the non-consensual collection of facial images constitutes an intrusive breach of privacy and can lead to the mass collection of sensitive biometric data without robust oversight.¹⁸

FRT can also erode the presumption of innocence. In some deployments, it's used to compare images of unknown individuals with existing databases, essentially casting a wide digital net and treating everyone as a potential suspect. This threatens due process rights and can lead to wrongful arrests and unnecessary interactions with law

¹⁴ Kim E. 'We're like guinea pigs': How an affordable Lower East Side complex got facial recognition. Gothamist. Published September 18, 2019. Accessed January 11, 2022. <https://gothamist.com/news/were-guinea-pigs-how-affordable-lower-east-side-complex-got-facial-recognition>.

¹⁵ Bellafante G. *The landlord wants facial recognition in its rent-stabilized buildings. Why?* The New York Times. Published March 28, 2019. Accessed January 13, 2022. <https://www.nytimes.com/2019/03/28/nyregion/rent-stabilized-buildings-facial-recognition.html>.

¹⁶ Bowyer K. *Facial recognition technology: security versus privacy*. IEEE Technology and Society Magazine. 2004.

¹⁷ Leslie D. *Understanding bias in facial recognition technologies*. ArXiv. 2020.

¹⁸ Dauvergne P. *Facial recognition technology for policing and surveillance in the Global South: a call for bans*. Third World Quarterly. 2022;43:2325-2335.

enforcement.¹⁹ Unchecked FRT implementation risks creating a society where every move can be tracked. Such an environment is incompatible with the exercise of fundamental rights such as freedom of speech, association, and the right to dissent, which all form cornerstones of a democratic society.²⁰ To safeguard civil liberties, stringent legal frameworks must be developed, requiring transparency in the deployment of FRT and strict limits on data use and retention.

a. Impact on housing

In the housing sector, property management companies might employ FRT for security purposes, such as access control to buildings. While the intent behind using FRT is to enhance security, its application can inadvertently result in discriminatory access practices. For instance, FRT's limitations in accurately recognizing faces from diverse racial and ethnic backgrounds can lead to disproportionate denials of access for certain groups. This not only inconveniences residents but also sends a subtle message of exclusion, potentially violating fair housing laws that protect against discrimination based on race, color, national origin, religion, sex, familial status, or disability.

Moreover, the constant surveillance facilitated by FRT can create an environment where residents feel their privacy is invaded. Knowing that their every move is monitored, individuals might refrain from exercising their rights to free speech and association within their homes or community spaces, fearing retaliation or negative consequences.

b. Impact on lending

In the financial services sector, FRT could be used for identity verification processes in loan applications. Like its application in housing, the technology's inaccuracies can lead to biased decision-making. If a loan applicant's image is wrongly matched with individuals having a poor credit history in the database, it could unfairly influence the outcome of their application. This form of digital profiling, based on flawed or biased algorithms, can perpetuate existing inequalities and restrict access to financial resources for underrepresented communities.

c. Neighborhood profiling

The cumulative effect of these practices can contribute to a broader environment of discrimination, where individuals from certain backgrounds, especially people of color, face systemic barriers to housing and financial services. Such an environment not only undermines the principles of equality and non-discrimination but also erodes trust in institutions that deploy FRT without considering its broader societal impacts.

FRT deployed in public spaces around housing complexes can create detailed logs of who lives in or visits a community. This data, potentially combined with law enforcement records, can lead to the labeling of certain neighborhoods as "high-risk" or "undesirable," leading to, for example, unaffordable home insurance, costly auto

¹⁹ Introna LD, Nissenbaum H. *Facial recognition technology: A survey of policy and implementation issues*. Center for Catastrophe Preparedness and Response, New York University. 2009. Accessed July 31, 2023.

²⁰ Upturn. *Face surveillance harms our civil rights (and civil liberties)*. Upturn. 2021. Accessed July 31, 2023.

insurance, financial deserts, poor school rating, poor neighborhood investment, and appraisal bias. This categorization can have profound impacts on residents. Landlords might increase scrutiny of rental applications from those areas, demanding higher deposits, stricter background checks, or even outright rejecting applicants. Lenders might use this neighborhood data as a proxy to assess the risk profiles of borrowers. Living in a neighborhood unfairly stigmatized by FRT-enabled surveillance could diminish perceived creditworthiness or lead to less favorable loan terms.

2. Privacy issues: data collection and retention practices

Facial recognition technology fuels large-scale collection of biometric data, which is highly sensitive and personally identifiable. Often this data collection takes place without individuals' clear knowledge or meaningful consent, as faces can be captured by cameras in public spaces. This erodes the ability to control one's own identity and information, infringing on the essential right to privacy.²¹

The retention of facial recognition data also raises concerns. Storing large databases of facial templates creates targets for security breaches or unauthorized access, with potentially far-reaching consequences if this sensitive information falls into the wrong hands.²² Furthermore, undefined or overly long retention periods allow the possibility of creating a detailed historical record of people's movements, associations, and habits. This long-term tracking further undermines privacy and can lead to unwarranted scrutiny of individuals' lives.²³ To mitigate these risks, policy recommendations should include mandatory informed consent for data collection, rigorous data protection standards, and clear guidelines on data retention periods to ensure that individuals retain control over their biometric data.

a. Privacy erosion and its discriminatory impact on housing

FRT allows for the non-consensual collection of highly sensitive biometric data in public or semi-public spaces around housing developments or communities. This violates the right to privacy and removes an individual's agency over their personal information. Data collected without consent has a higher potential for being used in discriminatory ways. Landlords or lenders could potentially gain access to databases of facial images to screen applicants. For example, landlords may seek individuals recorded attending specific protests, community meetings, or places of worship.

In addition, landlords or property management companies using FRT for security purposes might inadvertently or intentionally discriminate against tenants based on their frequent visitors, lifestyle choices, or even participation in political activities, inferred from the collected biometric data. Similarly, in the financial sector, lenders might use biometric data obtained through FRT as an additional layer of scrutiny in evaluating loan applicants, potentially leading to discriminatory practices based on

²¹ Kindt EJ. *Privacy and data protection issues of biometric applications*. In: Li SZ, Jain AK, editors. *Handbook of biometric anti-spoofing*. Springer International Publishing: Cham; 2020. p. 291-314.

²² Akhtar M. *Police use of facial recognition technology and the right to privacy and data protection in Europe*. NAVEIÑ REET: Nordic Journal of Law and Social Research. 2020.

²³ Crawford K, Schultz J. *AI Now report 2019*. AI Now Institute, New York University. 2019. Accessed July 31, 2023.

profiles built from an individual's biometric data history. Such practices not only discriminate but also deepen societal divisions, reinforcing biases against marginalized and vulnerable populations.

Awareness of such potential uses can lead individuals to modify their behavior, avoiding exercising their rights to association, religion, or free speech. This self-censorship disproportionately impacts marginalized groups who may already face greater scrutiny.

3. Instances of bias and discrimination

Studies have consistently shown that racial and gender biases are prevalent in facial recognition systems. Algorithms are often less accurate in identifying people of color, women, and gender non-conforming individuals.²⁴ This means that members of marginalized communities are more likely to be misidentified, leading to false arrests, detainment, or other harmful consequences.

Such algorithmic bias can perpetuate systemic biases and deepen existing social inequalities and amplify existing disparities in the criminal justice system, further contributing to the over-policing and wrongful targeting of marginalized groups. Moreover, FRT deployed in public spaces may cause marginalized groups to feel they are under constant unjustified surveillance, damaging trust with law enforcement and instilling a sense of alienation within their communities. To mitigate these risks, policy recommendations should include mandatory informed consent for data collection, rigorous data protection standards, and clear guidelines on data retention periods to ensure that individuals retain control over their biometric data.

a. How FRT bias harms marginalized communities

FRT systems that are less accurate for certain racial, ethnic, or gender groups have a higher chance of misidentifying individuals from those communities. This can unfairly associate someone with criminal activity, even if they have done nothing wrong. Misidentification by FRT dramatically increases the likelihood of unwarranted scrutiny from landlords, law enforcement, and lenders. Even if the misidentification is eventually cleared up, the initial interaction can cause lasting reputational harm, impacting housing and lending opportunities.

The deployment of FRT in already heavily policed neighborhoods (which are often those with higher proportions of people of color) reinforces the pattern of over-surveillance. This creates a sense of being constantly targeted based on identity, erodes trust in institutions, and fuels feelings of alienation within these communities.

4. Potential violations of civil rights: specific cases and research studies

Several real-world cases illustrate the potential of FRT to violate civil rights. Robert Williams, an African American man, was wrongfully arrested due to a false match by facial recognition

²⁴ Buolamwini J, Gebru T. *Gender shades: Intersectional accuracy disparities in commercial gender classification*. Proceedings of Machine Learning Research. 2018;81:1–15.

software.²⁵ Studies have shown that FRT can exacerbate police surveillance practices, particularly when deployed disproportionately in marginalized neighborhoods, contributing to discriminatory policing and rights violations.²⁶

Furthermore, FRTs threaten the First Amendment right to free assembly, as it has been used to monitor protests, potentially discouraging participation in lawful political expression. The potential for misuse can lead to a chilling effect on freedom of association and dissent (ACLU, 2020).²⁷ To prevent such violations, there should be clear regulatory frameworks that define acceptable uses of FRT, establish accountability for misuse, and provide avenues for redress for those adversely affected by the technology.

a. FRT-enabled wrongful arrests and their impacts on housing

Cases like Robert Williams's arrest illustrate how FRT errors disproportionately impact Black men and other people of color. While the arrest might eventually be overturned, the experience triggers a cascade of negative consequences that can linger long after. Even without a conviction, an arrest record (especially one triggered by flawed technology) can make landlords hesitant to rent to that individual. Similarly, background checks for loans may flag the arrest, raising doubts about the applicant's trustworthiness. High-profile cases of FRT-based wrongful arrests create an atmosphere of fear and mistrust in communities already facing discrimination. This can dissuade people from asserting their rights or seeking better housing options for fear of being wrongly targeted.

Applying Fair Housing and Fair Lending Laws to Facial Recognition Technology

There are two key laws that prohibit discrimination in lending and housing: the Fair Housing Act and the Equal Credit Opportunity Act ("ECOA"). The Fair Housing Act prohibits any entity from discriminating in housing and mortgage lending based on race, color, religion, national origin, sex (including sexual orientation), disability, and familial status (also known as "protected characteristics" or "protected classes" or "prohibited bases").²⁸ The Fair Housing Act also requires entities receiving federal funds for a housing or community development purpose to disseminate those funds and implement their programs and services in a way that Affirmatively Furthers Fair Housing. The ECOA prohibits "creditors" from discriminating in lending based on race, color, religion, national origin, sex (including sexual orientation), marital status, age, and source of income.²⁹

²⁵ Hill K. *Wrongfully accused by an algorithm*. The New York Times. June 24, 2020. Accessed July 31, 2023. <https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html>.

²⁶ Garvie C, Bedoya A, Frankle J. *The perpetual line-up*. Georgetown Law Center on Privacy & Technology. 2016. Accessed July 31, 2023. <https://www.perpetuallineup.org>.

²⁷ ACLU. *Face recognition technology*. ACLU. 2020. Accessed July 31, 2023. <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/face-recognition-technology>.

²⁸ The Fair Housing Act: 42 U.S.C. § 3601, et seq.; HUD's implementing regulation: 24 CFR Part 100.

²⁹ ECOA: 15 U.S.C. § 1619(a); CFPB's Regulation B: 12 CFR Part 1002.

Generally, there are two methods of proving discrimination under either the Fair Housing Act or ECOA: “disparate treatment” or “disparate impact.”³⁰ Disparate treatment occurs when an entity explicitly, overtly, or intentionally treats people differently based on prohibited characteristics, such as race, national origin, or sex. Disparate treatment can be proven through direct evidence or indirect (or “circumstantial”) evidence, for example comparator evidence, statistical evidence, or a pretextual explanation. Although disparate treatment is known as “intentional discrimination,” the law does not actually require showing prejudice, animus, or even an intent to treat someone worse because of a protected class; the differential treatment is enough to establish a violation of law.³¹ An example of potential disparate treatment discrimination would be a facial recognition technology (FRT) that relies on a face detection or face feature extractor that explicitly included a protected class (such as color) or its proxy as a factor in its face recognition system, or that resulted in different, adverse outcomes on a prohibited basis (such as color) for similarly-situated individuals.

Disparate impact discrimination occurs when a (1) facially neutral policy or practice disproportionately harms members of a protected class, and either (2) the policy or practice does not advance a legitimate interest, or (3) a less discriminatory alternative to serve the legitimate interest exists. Disparities alone are not sufficient to impose disparate impact liability, and entities are not required to sacrifice legitimate business needs or ignore relevant business considerations. Disparate impact only requires entities to avoid considerations that disproportionately harm members of protected classes unnecessarily. A potential scenario in housing where FRT may constitute disparate impact involves the installation of surveillance cameras in public housing, aiming to enhance security. If the FRT used in these cameras has higher misidentification rates for residents of certain racial backgrounds, it could lead to unjustified scrutiny or enforcement actions against them. While the housing authority may cite enhanced safety and crime reduction as the justification for using this FRT, it is crucial to prove that these goals could not be achieved without measures carrying such a high risk of racial bias and intrusive surveillance. Systems focusing on property crime deterrence (e.g., better lighting, securing entry points) instead of constant people monitoring may constitute least discriminatory alternatives that meet the company’s objectives of enhanced safety and crime reduction.

Institutions should be aware that they need adequate Compliance Management Systems (CMS) to monitor and test AI models for potential discrimination, search for less discriminatory alternatives, and implement appropriate controls for fair lending or fair housing risk.³² Courts and agencies have for decades recognized that disparate impact liability exists under laws like the Fair Housing Act, ECOA, and Title VII (prohibiting employment discrimination).³³ Disparate impact liability has been a part of Regulation B, which implements ECOA, since the 1970s and

³⁰ Based on legal precedent, the federal financial regulators have also based fair lending risk assessments on these theories of discrimination. See FFIEC, *Interagency Fair Lending Examination Procedures* (2009), <https://www.ffiec.gov/pdf/fairlend.pdf>.

³¹ See 12 C.F.R. Part 1002, 4(a)-1: “Disparate treatment on a prohibited basis is illegal whether or not it results from a conscious intent to discriminate.”

³² See, e.g., Relman, Colfax, *Initial Report of the Independent Monitor, Fair Lending Monitorship of Upstart Network’s Lending Model* (April 14, 2021), https://www.relmanlaw.com/media/cases/1086_Upstart%20Initial%20Report%20-%20Final.pdf.

³³ See, e.g., 12 C.F.R. part 1002, Supp. I, ¶ 6(a)-2 (ECOA articulation); 24 C.F.R. § 100.500(c)(1) (FHA articulation); 42 U.S.C. § 2000e-2(k) (Title VII articulation).

was included in the federal agencies' 1994 Policy Statement on Discrimination in Lending.³⁴ It has also been sanctioned by the U.S. Supreme Court and 11 appellate courts.³⁵ Moreover, federal agencies have long provided guidance informing institutions of their obligations for third party oversight.³⁶ Institutions should be aware that using a third-party AI model does not insulate them from liability.

Policy Recommendations

The United States Must Enact Comprehensive Legislation to Advance Responsible AI

AI technologies have led to significant advances in face recognition, face detection and face analysis technologies. For example, many of the recent advances in FRT are due to deep learning algorithms, a subset of machine learning that use layered (or "deep") neural networks to analyze various forms of data, thereby enabling computers to learn from experience and understand the world in terms of a hierarchy of concepts. While there are significant risks of bias and discrimination in AI systems, including face recognition systems behind FRT, and their impact on housing and financial services can be detrimental to the economy, the risks are not insurmountable. The U.S. must play a leadership role in advancing Responsible AI principles. Leading the world on these issues includes passing comprehensive legislation that forms the basis for sound policies, principles, practices, and frameworks for Responsible AI. While much of the world's technological innovations are developed in the U.S., other nations are significantly stepping up their efforts by building the infrastructure needed to spur AI innovations. The U.S. must lead the world in ensuring technologies are fair and beneficial; do not harm people and communities; and promote ideals of freedom, including ensuring robust privacy protections, equality, and equity.

For these reasons, the Commission could emphasize the importance of the U.S. leading in the development and enforcement of Responsible AI principles, addressing the potential biases in AI systems, including face recognition systems. This leadership could involve advocating for comprehensive legislation that establishes a robust framework for Responsible AI, emphasizing fairness, privacy, equality, and equity, and ensuring AI technologies benefit society without causing harm. The Commission should advocate for legislative action to address and mitigate the risks of FRT bias, promoting the establishment of fairer and more equitable technological frameworks by:

Ensuring Strong Civil and Human Rights Protections

The U.S. Commission on Civil Rights should urge for the development of AI legislation aligned with America's core civil and human rights principles, promoting freedom, equality, and equity. Acknowledging the resource constraints faced by civil, human rights, and consumer protection

³⁴ DOJ, HUD, FTC, Federal Housing Finance Board, Federal Reserve, FDIC, OCC, Office of Thrift Supervision, and NCUA, *Interagency Policy Statement on Fair Lending* (1994) <https://www.govinfo.gov/content/pkg/FR-1994-04-15/html/94-9214.htm>.

³⁵ See *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015).

³⁶ The agencies recently replaced each of their separate policies dating as early as 2008 for joint guidance. See Federal Reserve, FDIC, OCC, *Interagency Guidance on Third Party Relationships: Risk Management*, 88 Fed. Reg. 37920 (June 9, 2023) <https://www.govinfo.gov/content/pkg/FR-2023-06-09/pdf/2023-12340.pdf>.

organizations in ensuring technology's beneficial use, the Commission might suggest increased federal support for oversight and accountability measures. It could propose partnerships among organizations like NIST, civil rights groups, consumer protection agencies, non-profits, and financial institutions using FRT to assess its impacts on fair housing and lending and recommend the National Science Foundation allocate research funds to explore FRT's civil rights implications.

Ensuring Compliance with Existing Civil Rights and Consumer Protection Laws

The U.S. Commission on Civil Rights should highlight the importance of federal agencies implementing stringent policies to ensure institutions comply with their legal responsibilities to evaluate AI models, including face recognition systems, for potential discrimination through disparate treatment or impact. This Commission should emphasize the need for ongoing oversight and testing to uphold civil rights standards by encouraging the following actions:

- First, all federal agencies with responsibility for supervision and/or enforcement of the Fair Housing Act and/or ECOA (collectively, the Agencies)³⁷ should emphasize that discrimination in AI models is illegal, including AI models developed or deployed by third parties. In 2023, the DOJ, FTC, CFPB, and EEOC issued a joint statement regarding enforcement efforts to protect the public from bias in AI and automated systems.³⁸ The remaining federal agencies should immediately issue a similar announcement.
- Second, consistent with the Uniform Interagency Consumer Compliance Rating System³⁹ and the Model Risk Management Guidance,⁴⁰ the Agencies should ensure that financial institutions have appropriate Compliance Management Systems that effectively identify, and control risks related to AI models, including the risk of discriminatory outcomes for consumers. Where a financial institution's use of AI indicates weaknesses in their Compliance Management System or violations of law, the Agencies should use their full authority and force of law to quickly address and prevent consumer harm, including issuing supervisory Matters Requiring Attention; entering into a non-public enforcement action, such as a Memorandum of Understanding; referring a pattern or practice of discrimination to the DOJ; or entering into a public enforcement action. The Agencies have already provided clear guidance (e.g., the Uniform Consumer Compliance Rating System) that financial institutions must appropriately identify, monitor, and address compliance risks, and the Agencies should not hesitate to act within the scope of their

³⁷ The DOJ and HUD have responsibility for enforcement of the Fair Housing Act. The DOJ and FTC have enforcement authority for ECOA. The FHFA, FDIC, Federal Reserve Board, FDIC, OCC, and NCUA have supervision and enforcement authority for certain financial institutions with respect to the Fair Housing Act and ECOA. The CFPB has regulatory, supervision, and enforcement authority for ECOA.

³⁸ CFPB, DOJ, EEOC, FTC, *Joint Statement on Enforcement Efforts against Discrimination and Bias in Automated Systems* (April 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf.

³⁹ Federal Financial Institutions Examination Council, *Uniform Interagency Consumer Compliance Rating System* (Nov. 14, 2016) <https://www.govinfo.gov/content/pkg/FR-2016-11-14/pdf/2016-27226.pdf>.

⁴⁰ See, e.g., FHFA, *Artificial Intelligence, Machine Learning Model Risk Management*, Advisory Bulletin 2022-02 (Feb. 10, 2022) (explicitly addressing fairness and equity), <https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/Pages/Artificial-Intelligence-Machine-Learning-Risk-Management.aspx>; Federal Reserve, OCC, *Guidance on Model Risk Management* (April 2011) <https://www.federalreserve.gov/supervisionreg/srletters/sr1107a1.pdf>.

authority. When possible, the Agencies should explain to the public the risks that they have observed, and the actions taken to bolster the public's trust in appropriate oversight and provide clear examples to guide the industry.

- Finally, the Agencies should clarify acceptable methods for AI testing and least discriminatory alternative search so that institutions can align their methods accordingly. Existing civil rights laws and policies provide a framework for the Agencies to analyze fair lending risk in AI, including face recognition systems behind FRT, and to engage in supervisory or enforcement actions, where appropriate. That said, the Agencies can be more effective in ensuring consistent and effective compliance by setting clear regulatory expectations regarding testing for the risk of discrimination. The Agencies have been in learning mode for some time. Indeed, the Agencies have yet to issue guidance even after receiving a robust response to their Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence in March of 2021.⁴¹

To retain America's competitive edge in the global society, the Agencies should move quickly to issue actionable policy statements that clearly state their commitment to consumer protection and civil rights laws, including fair lending laws; insight into their supervisory expectations and methods; and useful guardrails and best practices. The time to act is now as the use of AI proliferates in every aspect of consumer financial services and housing and has the potential for far-reaching adverse impacts for consumers of color and other protected groups.

Integrating the Review of Equity in the Algorithm's Lifecycle and Requiring Auditing Requirements for AI, including FRT, in Housing and Lending

Given the systemic discrimination that exists in almost every aspect of American life, there is a high risk that the data and models used for face recognition systems will reflect that systemic bias. Accordingly, it is imperative that equity and non-discrimination be top of mind at every phase of the algorithm's lifecycle. It is not enough to merely consider discrimination risk once the AI system is built or even deployed. Instead, the risk of bias must be considered and mitigated at every phase, from data selection to development to deployment to monitoring. Unfortunately, in many instances, regulators in the United States seem to view fair housing and fair lending risk as separate and apart from other AI model risks.

- The Commission should investigate the use of frameworks like NIST's Risk Management Framework⁴² and NFHA's AI auditing framework,⁴³ particularly in housing and financial services. This investigation should determine their effectiveness in mitigating AI bias.

⁴¹ CFPB, Federal Reserve, FDIC, OCC, and NCUA, *Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, including Machine Learning* (March 31, 2021) <https://www.govinfo.gov/content/pkg/FR-2021-03-31/pdf/2021-06607.pdf>. See also, NFHA et al., Response to RFI re AI (July 1, 2021), <https://nationalfairhousing.org/leading-civil-rights-consumer-and-technology-advocates-urge-the-federal-financial-regulators-to-promote-equitable-artificial-intelligence-in-financial-services/>.

⁴² See NIST, *Artificial Intelligence Risk Management Framework*, U.S. Department of Commerce (Jan. 26, 2023), <https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>.

⁴³ See Michael Akinwumi, Lisa Rice, and Snigdha Sharma, *Purpose Process, and Monitoring: A New Framework for Auditing Algorithmic Bias in Housing and Lending*, National Fair Housing Alliance (2022), https://nationalfairhousing.org/wp-content/uploads/2022/02/PPM_Framework_02_17_2022.pdf.

- The Commission should emphasize the importance of allocating governmental funds towards the development of research tools and supporting organizations focused on civil rights and consumer protection. This approach would aim to bridge the resource gap and address the oversight in philanthropic efforts concerning these pivotal areas, ensuring a more equitable distribution of support and attention towards fostering an inclusive environment.

Promoting Effective Training for the Federal Workforce

Many in the federal workforce currently lack sufficient knowledge about how data-driven systems can perpetuate bias and discrimination. Many federal workers also do not have the requisite training needed to effectively test, monitor, and provide oversight over systems such as those used for face recognition, face detection, and face analysis. This knowledge gap hinders effective testing, monitoring, and oversight of these technologies, potentially undermining the enforcement of civil rights laws.

The Commission should investigate the scope of this knowledge gap within federal agencies, focusing on potential impacts on fair housing, racial equity, and other protected characteristics. A comprehensive report on the Commission's findings should be made public. The Commission should advocate for Congress to mandate comprehensive training on technology and AI bias for federal regulators and enforcement agencies. This training must have a strong emphasis on fair housing and racial equity principles. The Commission should push for the allocation of resources to ensure federal agencies have the equipment and skilled personnel needed for rigorous testing and oversight of technologies with the potential for discriminatory impact. The Commission should foster collaboration and the sharing of best practices among federal agencies. It should highlight the work of data scientists and engineers trained in fairness, encouraging agencies to adopt these approaches for debiasing technologies and building fairer systems.

Ensuring Equitable Digital Access, Public Data Access, Transparency and Explainability

America is at a critical juncture in deciding whether to develop facial recognition systems that continue to perpetuate historical discriminatory practices or create equitable face recognition systems that uplift society. The U.S. Commission on Civil Rights should recognize the critical need to address the intersection of digital inequity and the risks of biased face recognition systems. The lack of equitable access to broadband in rural areas and communities of color perpetuates disparities and can further entrench discrimination through FRT in sectors like housing and financial services when the technology is used to administer access to services and benefits.

- The Commission should investigate the ways limited broadband access and technology gaps exacerbate the potential harm of biased automated systems. This investigation should encompass housing, financial services, law enforcement, immigration, and other domains where FRT is being used to make decisions or augment decision-making

processes. The investigation must cover how data usage can balance privacy rights with the need to protect civil and human rights.⁴⁴

- The Commission should produce a public report detailing its findings, highlighting how the digital divide and AI bias create a double burden for marginalized groups. This report should inform legislative and regulatory actions on these issues.
- The Commission should advocate for greater public availability of de-identified robust and reliable data related to FRT use in housing and financial services. This is critical for researchers and advocacy groups to assess discriminatory impacts and promote fairness.
- The Commission should recommend that Congress encourage partnerships between the Consumer Financial Protection Bureau, the Department of Housing and Urban Development, and academic or non-profit researchers. This would facilitate tracking and analysis of FRT use and its specific impact on consumers of color and other protected classes.
- The Commission should emphasize the need for federal legislation and regulation mandating transparency in FRT within the public and private sectors. It should underscore the importance of explanations for FRT-based outcomes and testing methodologies aimed at uncovering and mitigating bias.

Finally, the Commission should investigate the extent to which FRTs used in sectors it oversees (such as housing, lending, etc.) lack transparency. It should identify common barriers to understanding the data, reasoning, and decisions behind FRT-based decisions. If existing legislation and regulatory frameworks prove insufficient to guarantee transparency, the Commission should advocate for Congress to pass laws mandating explainability and transparency in face recognition systems deployed in high-stakes domains relevant to civil rights.

Ensuring Technologies Developed Outside of the U.S. Adhere to U.S. Rules and Regulations

The Commission should investigate the use of face recognition systems developed abroad and imported for use within the United States. This investigation should assess potential risks to civil rights and consumer protections as they relate to these foreign-developed systems. The investigation and risk assessment should lead the Commission to take the following steps:

- The Commission should prepare a public report on its findings. This report should outline specific areas where imported AI technologies may conflict with U.S. civil rights standards or consumer protection laws, highlighting the potential for both intentional and unintentional harms.
- Based on its research, the Commission should issue recommendations for federal policymakers. This guidance should focus on ensuring that U.S. trade policies and regulatory frameworks address the importation and use of foreign-developed AI systems.
- The Commission should seek partnerships with international civil rights organizations and regulators. This collaboration could enable the exchange of information on global AI

⁴⁴ To more fully understand NFHA's position on balancing civil rights with privacy in housing decisions, see NFHA and Tech Equity Collaborative, *Privacy, Technology, and Fair Housing - A Case for Corporate and Regulatory Action* (Aug. 2023), <https://nationalfairhousing.org/wp-content/uploads/2023/08/NFHA-TechEquity-Paper-final.pdf>.

trends and the development of consistent standards designed to protect rights, with a particular focus on preventing the import of technologies inherently designed for discrimination or surveillance.

Improve Consumers' Ability to Have Agency Over Their Data

Disclosure and notice and consent requirements are insufficient means of providing consumers agency over their data used in housing and financial services decisions. In addition to adequate privacy protections, consumers must consent to how, where, when, and under what circumstances their personal data will be utilized. The European Union and California are currently leading in this space.

- The Commission should issue a public report detailing its findings and highlighting the need to move beyond a reliance on notice and consent as the primary means of consumer protection. This report should outline the potential risks to civil rights when data is misused in AI-powered decision-making.
- The Commission should conduct a comparative analysis of privacy frameworks in the European Union and California. It should identify strengths and potential shortcomings in these models, leading to recommendations for how their best practices can inform federal legislation.
- The Commission should advocate for a rights-based framework for consumer data protection in legislation. This should include principles like consumer ownership of data, strict limitations on use without explicit consent, data minimization requirements, and mandatory discrimination testing for AI models, including face recognition systems.
- The Commission should push for legislation encouraging development of privacy-enhancing technologies applicable to face recognition systems. It should also advocate for strengthening regulatory complaint systems to address FRT-specific harms and for increasing the clarity and possible damages under existing laws when consumer data protections are violated.

Conclusion

It is imperative that the U.S. lead the world in establishing policies and frameworks to advance technological innovations while ensuring these systems are fair, privacy-preserving, reliable, transparent, and respectful of human alternatives when warranted. Technological innovations can provide great benefits to people and society as well as spur economic progress. Yet deploying face recognition systems without adequate rights-preserving protocols, testing, and oversight can disenfranchise people of color, marginalized groups and low-income households from the American dream by unfairly and inappropriately denying access to housing, credit, other important opportunities and services. For example, researchers have found that racial inequality has cost the U.S. economy \$16 trillion (about \$49,000 per person in the US) over the past 20 years.⁴⁵ Highlighting the economic and social repercussions of racial inequalities exacerbated by unchecked face recognition systems, the Commission might recommend comprehensive guidelines to ensure technological advancements benefit all citizens, safeguarding civil rights and fostering economic growth.

⁴⁵ Dana Peterson and Catherine Mann, *Closing the Racial Inequality Gaps*, Citigroup, (Sept. 2020), <https://www.citigroup.com/global/insights/citiqps/closing-the-racial-inequality-gaps-20200922>.