Questions from Senator Thom Tillis for
Damon Hewitt,
President & Executive Director of the
Lawyers' Committee for Civil Rights Under Law

Witness for the U.S. Senate Committee on the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights
Hearing on
"The New Invisible Hand? The Impact of Algorithms on Competition and Consumer Rights"

December 13, 2023 at 3pm

1. The AMERICA Act would prohibit large digital advertising companies from owning more than one part of the digital ad ecosystem. In your opinion, should this take effect today do you see any unintended consequences?

The Lawyers' Committee for Civil Rights Under Law has not taken a position on the AMERICA Act and cannot comment on the specifics of that piece of legislation. We do know that the current digital ad ecosystem fuels both intentional and unintentional discrimination against Black people and other people of color. The ability to target individuals based on real or assumed characteristics, including race, sex, and age, has proven to be deleterious for the equal opportunity of all online.

This problem is prevalent among large platforms. Meta (previously known as Facebook), X (previously known as Twitter), and Google all have been investigated for, settled lawsuits over, or had academic research show that their use of ad delivery algorithms or practices reproduce discrimination even when the advertiser did not intend to discriminate.[1]

For example, Meta recently settled a housing discrimination lawsuit brought by the Department of Justice and Department of Housing and Urban Development, which alleged that Facebook's advertising targeting and delivery mechanisms discriminated on the basis of race and other protected characteristics—including literal redlining.[2] Meta agreed to create a new system to reduce disparities in the delivery of housing ads as part of the settlement.[3] Meta has also been sued by civil rights advocates for similar conduct and causes of action.[4]

This settlement came after years of reports and research showing that Meta's advertising system both allows discriminatory targeting and algorithmically delivers ads in a discriminatory fashion—issues that have persisted despite promises to

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[1] Louise Matsakis, *Facebook's Ad System Might be Hard-Coded for Discrimination*, WIRED, Apr. 6, 2019, https://www.wired.com/story/facebooks-ad-system-discrimination/.

[2] *See* U.S. Dep't of Just., *Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook, to Resolve Allegations of Discriminatory Advertising* (June 21, 2022), https://www.justice.gov/opa/pr/justice-department-secures-groundbreaking-settlement-agreement-meta-platforms-formerly-known; Charge of Discrimination at 4, *U.S. Dep't of Hous. & Urban Dev. v. Facebook, Inc.*, FHEO No. 01-18-0323-8 (Mar. 28, 2019); *see also* Brief of *Amicus Curiae* Lawyers' Committee for Civil Rights Under Law in Support of Plaintiff's Opposition to Facebook's Demurrer to First Amended Complaint at 10, *Liapes v. Facebook, Inc.*, Case No. 30-CIV-01712 (Cal. Super. Ct. Mar. 5, 2021), https://lawyerscommittee.org/wp-content/uploads/2021/03/Leave-and-Amicus-Combined.pdf.

[3] *See* Salvador Rodriguez, *Facebook Starts Effort to Boost Equity in Housing Ads*, WALL ST. J. (Jan. 9, 2023), https://www.wsj.com/articles/facebook-starts-effort-to-improve-equity-in-housing-ads-11673294404.

[4] *See* Galen Sherwin & Esha Bhandari, *Facebook Settles Civil Rights Cases by Making Sweeping Changes to Its Online Ad Platform*, ACLU (Mar. 19, 2019), https://www.aclu.org/news/womens-rights/facebook-settles-civil-rights-cases-making-sweeping.

address the problem.[5] Meta's own civil rights auditors called out the risk of algorithmic bias in its advertising system.[6]

Google and Twitter have both been investigated by HUD for similarly discriminating in housing advertisements in violation of the Fair Housing Act.[7] This problem is not limited to the housing sector. Meta's targeted advertising systems also discriminate in employment. Employment ads online can discriminate in both their targeting and in their algorithmic delivery.[8]

The Lawyers' Committee has consistently advocated for data privacy protections and bright-line rules against discrimination online so that individuals are protected from predatory uses of their personal information to deny them opportunities or craft

[5] **Discriminatory Targeting:** Angie Waller, *Facebook Says It's Dropped "Sensitive" Ad Targeting Categories*, THE MARKUP (Jan. 25, 2022), https://themarkup.org/newsletter/citizen-browser/facebook-says-its-dropped-sensitive-ad-targeting-categories; Jinyan Zang, *Solving the Problem of Racially Discriminatory Advertising on Facebook*, BROOKINGS (Oct. 19, 2021), https://www.brookings.edu/research/solving-the-problem-of-racially-discriminatory-advertising-on-facebook/; Jon Keegan, *Facebook Got Rid of Racial Ad Categories. Or Did It?*, THE MARKUP (July 9, 2021), https://themarkup.org/citizen-browser/2021/07/09/facebook-got-rid-of-racial-ad-categories-or-did-it; Jeremy B. Merrill, *Does Facebook Still Sell Discriminatory Ads?*, THE MARKUP (Aug. 25, 2020), https://themarkup.org/the-breakdown/2020/08/25/does-facebook-still-sell-discriminatory-ads; Barbara Ortutay, *Facebook to Overhaul Ad Targeting to Prevent Discrimination*, ASSOCIATED PRESS (Mar. 19, 2019), https://www.apnews.com/38c0dbd8acb14e3fbc7911ea18fafd58; Julia Angwin & Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, PROPUBLICA (Oct. 28, 2016), https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race.
Discriminatory Delivery: Levi Kaplan et al., *Measurement and Analysis of Implied Identity in Ad Delivery Optimization*, In *Proc. 22nd ACM Internet Measurement Conf.*, Ass'n for Computing Mach. (Oct. 2022), https://dl.acm.org/doi/pdf/10.1145/3517745.3561450; Muhammad Ali et al., *Discrimination Through Optimization: How Facebook's Ad Delivery Can Lead to Skewed Outcomes*, 3 *Proc. ACM on Human-Computer Interaction*, No. 199 (Nov. 2019), https://dl.acm.org/doi/10.1145/3359301; Ava Kofman & Ariana Tobin, *Facebook Ads Can Still Discriminate Against Women and Older Workers, Despite a Civil Rights Settlement*, PROPUBLICA (Dec. 13, 2019), https://www.propublica.org/article/facebook-ads-can-still-discriminate-against-women-and-older-workers-despite-a-civil-rights-settlement; Louise Matsakis, *Facebook's Ad System Might be Hard-Coded for Discrimination*, WIRED (Apr. 6, 2019), https://www.wired.com/story/facebooks-ad-system-discrimination/.
[6] Laura W. Murphy & Megan Cacace, *Facebook's Civil Rights Audit – Final Report*, Facebook 72–82 (July 8, 2020), https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf.
[7] Tracy Jan & Elizabeth Dwoskin, *HUD is Reviewing Twitter's and Google's Ad Practices as Part of Housing Discrimination Probe*, WASH. POST (Mar. 28, 2019), https://www.washingtonpost.com/business/2019/03/28/hud-charges-facebook-with-housing-discrimination/.
[8] *See, e.g.*, Rory Cellan-Jones, *Facebook Accused of Allowing Sexist Job Advertising*, BBC (Sept. 9, 2021), https://www.bbc.com/news/technology-58487026; Jeff Horwitz, *Facebook Algorithm Shows Gender Bias in Job Ads, Study Finds*, WALL ST. J. (Apr. 9, 2021), https://www.wsj.com/articles/facebook-shows-men-and-women-different-job-ads-study-finds-11617969600; Nicolas Kayser-Bril, *Automated Discrimination: Facebook Uses Gross Stereotypes to Optimize Ad Delivery*, ALGORITHM WATCH (Oct. 18, 2020), https://algorithmwatch.org/en/automated-discrimination-facebook-google/.

online experiences based on stereotypes. Large or small, all online advertisers have a responsibility to ensure that their ad servicing is non-discriminatory.

2. Development of AI will only continue to grow and as a result more and more sophisticated AI tools will become available and the use of AI tool more prevalent. What can Congress do now to better to plan for the impact on competition, without stifling AI innovation?

The Lawyers' Committee has written a model bill, the "Online Civil Rights Act," calling on Congress to protect civil rights *and* promote responsible development and use of artificial intelligence (AI).[9] We urge Congress to introduce and pass this legislation and adopt the concepts and tenets of the Act in equivalent legislation to regulate AI.

The "Online Civil Rights Act" model legislation addresses the discriminatory outcomes, bias, and harm arising from algorithmic systems, including AI products and large language models, in six key ways. First, it includes a specific anti-discrimination provision to prohibit algorithmic discrimination. Second, it requires that algorithmic tools are evaluated and assessed, *before* and *after* deployment, for discrimination and bias. We believe that such assessments will foster innovation, provide model best practices and build expertise in developing and deploying AI in a way that respects individual rights. Third, the "Online Civil Rights Act" requires developers and deployers of AI to have a *duty of care* requiring that the products they offer are safe and effective. Fourth, the legislation includes transparency and explainability requirements so that consumers know when, how, and why AI is being used. Fifth, the bill includes data protection requirements, so that AI developers and deployers are required to collect and use only as much personal data as is reasonably necessary to provide the services that consumers expect, and to safeguard that data. Finally, the Online Civil Rights Act establishes robust oversight and a private right of action, which allows individuals to assert their rights in court, and oversight from states and federal agencies.

The "Online Civil Rights Act" seeks to both mitigate and prevent current, ongoing harms while also providing a broad, tech-neutral regulatory and governance regime to sufficiently address generative AI and further technological development in this space. Congress should look to it as a model for legislating in a way that protects innovation while strengthening equal access to the marketplace.

3. Can algorithms be manipulated by bad actors to censor free speech, specifically during an election cycle? And if so, how?

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[9] *More information available at* https://www.lawyerscommittee.org/online-civil-rights-act/.

The Lawyers' Committee convenes Election Protection, the nation's largest nonpartisan voter protection program that includes a voter hotline, where we hear directly from voters about the problems they are experiencing. Bad actors can and do use algorithms to affect our elections, but we have not seen algorithms deployed to censor free speech. Rather, election denial and false claims about the legitimacy of our elections are often used as grist to justify the suppression of voters of color, to obviate their objections to attacks on their rights. We have experienced copious encounters with the damage to our democracy that such claims have caused, and of other ways that algorithms have been deployed to fuel attacks on our democracy.

Several examples of real harms to our elections that are exacerbated by algorithmic technologies include the following:

Those seeking to engage in voter suppression can use datasets of personal information combined with robocalls, robotexts, and other mass communications tools to microtarget and spread voter intimidation at a scale and low cost previously unimagined. These techniques are enhanced and made more accessible through the proliferation of algorithmic tools. In one prominent example from the 2020 election, two men sent over 80,000 robocalls targeted to Black voters, seeking to deter them from voting by mail.[10] They spent only $1,000 on the robocalls.[11] The court ruled this conduct violated the Voting Rights Act and the Ku Klux Klan Act of 1871.[12] The court stated in that case:

> Today, almost 150 years later, the forces and conflicts
> that animated Congress's adoption of the Ku Klux Klan
> Act as well as subsequent voting rights legislation, are
> playing out again before this Court, though with a
> difference. In the current version of events, the means
> Defendants use to intimidate voters, though born of fear
> and similarly powered by hate, are not guns, torches,
> burning crosses, and other dire methods perpetrated
> under the cover of white hoods. Rather, Defendants carry
> out electoral terror using telephones, computers, and
> modern technology adapted to serve the same deleterious
> ends. Because of the vastly greater population they can
> reach instantly with false and dreadful information,
> contemporary means of voter intimidation may be more
> detrimental to free elections than the approaches taken

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[10] *See Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020).

[11] Memorandum of Law in Support of Plaintiffs' Joint Motion for Summary Judgment as to Liability on All Claims at 1, *Nat'l Coal. on Black Civic Participation v. Wohl*, Case No. 20-cv-8668 (July 29, 2022), ECF No. 213.

[12] *Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20-cv-8668, __ F. Supp. 3d __, 2023 WL 2403012 (S.D.N.Y. Mar. 8, 2023) (granting affirmative summary judgment).

for that purpose in past eras, and hence call for swift and effective judicial relief.[13]

The court also found the Defendants' message itself invoked the specter of surveillance, made effective through the use of algorithmic technology, to intimidate voters, noting that "[v]oter privacy is . . . vital to election integrity."[14]

A right-wing social media influencer was convicted of conspiring with other Twitter users to spread deceptive images and tweets to supporters of Hillary Clinton during the 2016 election cycle. The images and tweets falsely suggested that voters could cast their votes via text message or social media. The convicted influencer, who was ranked as the 107th-most important influencer for the 2016 presidential election by MIT Media Lab, specifically discussed the importance of limiting "black turnout" and targeting suppressive messaging towards "Black social spaces."[15] One of the images posted as part of the disinformation campaign was falsely framed as a Clinton campaign ad depicting a Black woman with an "African Americans for Hillary" sign and encouraging voters to "Avoid the Line" and "Vote from Home."[16]

The Russian government used social media platforms to attempt to interfere in the 2016 U.S. election, including specifically targeting content to Black Americans intended to undermine confidence in the election and dissuade them from voting.[17] The campaign also used racially divisive issues in targeted ads.[18] Foreign adversaries used conventional advertising and targeting tools on social media,[19] showing the

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[13] *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 464.

[14] *Nat'l Coal. on Black Civic Participation*, 2023 WL 2403012, at *22.

[15] Associated Press, *Far-right Influencer Convicted in Voter Suppression Scheme*, POLITICO (Mar. 31, 2023), https://www.politico.com/news/2023/03/31/far-right-influencer-convicted-in-voter-suppression-scheme-00090042; Colin Moynihan, *Trump Supporter Convicted in 2016 Scheme to Suppress Votes for Clinton*, N.Y. TIMES (Mar. 31, 2023), https://www.nytimes.com/2023/03/31/nyregion/douglass-mackey-trial-twitter-misinformation.html.

[16] Press Release, U.S. Att'y's Off. for the E. Dist. of N.Y., *Social Media Influencer Douglass Mackey Convicted of Election Interference in 2016 Presidential Race* (Mar. 31, 2023), https://www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-convicted-election-interference-2016.

[17] *See* S. Rep. No. 116-290 (2020), https://www.intelligence.senate.gov/publications/report-select-committee-intelligence-united-states-senate-russian-active-measures; Scott Detrow, *What Did Cambridge Analytica Do During The 2016 Election?*, NPR (Mar. 20, 2018), https://www.npr.org/2018/03/20/595338116/what-did-cambridgeanalytica-do-during-the-2016-election; *see also* Gregory Eady et al., *Exposure to the Russian Internet Research Agency Foreign Influence Campaign on Twitter in the 2016 US Election and Its Relationship to Attitudes and Voting Behavior*, 14 Nature Commc'ns, at 1, 9 (Jan. 9, 2023), https://www.nature.com/articles/s41467-022-35576-9 ("In a word, Russia's foreign influence campaign on social media may have had its largest effects by convincing Americans that its campaign was successful.").

[18] *See* Renee DiResta et al., *The Tactics & Tropes of the Internet Research Agency*, New Knowledge & S. Select Comm. on Intel. (Oct. 2019), https://digitalcommons.unl.edu/senatedocs/2/.

[19] *See* Press Release, FTC, *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook* (July 24, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook.

dangerous ways in which off-the-shelf targeted advertising tools can be abused.[20] Researchers and reporters have documented Facebook groups selling accounts already approved to run political ads, allowing bad actors to circumvent Facebook's identity verification process.[21]

Social media also plays a key role in disinformation campaigns that spread conspiracy theories and seek to undermine election integrity.[22] The structure of the platforms, their profiling of users, and the use of recommendation engines to maximize user engagement at all costs can create a perfect storm for the spread of disinformation and disenfranchisement.[23] Misinformation is often more likely to be engaged with and shared than factual information, and platforms with greater pathways for virality are more likely to amplify misinformation.[24] "[T]o tackle thorny issues like misinformation, [Facebook employees] often had to demonstrate that their proposed solutions wouldn't anger powerful partisans or come at the expense of Facebook's growth."[25]

YouTube was more likely to recommend videos involving election fraud conspiracy theories to users known to be skeptical about election validity, amplifying fringe disinformation.[26] Its AI content moderation system struggled with combatting disinformation in the short-form YouTube Shorts and in Spanish language videos.[27]

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[20] *See* Craig Silverman, *Google Allowed a Sanctioned Russian Ad Company to Harvest User Data for Months*, PROPUBLICA (July 1, 2022), https://www.propublica.org/article/google-russia-rutarget-sberbank-sanctions-ukraine.

[21] *See* Sarah Emerson & Emily Baker-White, *Facebook Has a Thriving Black Market of Fraudulent Ad Accounts, Passports and Driver's Licenses*, FORBES (Nov. 14, 2022), https://www.forbes.com/sites/sarahemerson/2022/11/11/facebook-fraud-passports-political-ads/?sh=432e30d6927f.

[22] *See* ELECTION INTEGRITY P'SHIP, *The Long Fuse: Misinformation and the 2020 Election* (2021), https://www.eipartnership.net/report.

[23] *See* Karen Hao, *How Facebook Got Addicted to Spreading Misinformation*, MIT TECH. REV. (Mar. 11, 2021), https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation/; Jeff Horwitz, *Facebook's Former Elections Boss Now Questions Social Media's Impact on Politics*, WALL ST. J. (Jan. 8, 2022), https://www.wsj.com/articles/facebooks-former-elections-boss-now-questions-social-medias-impact-on-politics-11641648561.

[24] Steven Lee Myers, *How Social Media Amplifies Misinformation More than Information*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2022/10/13/technology/misinformation-integrity-institute-report.html.

[25] Kevin Roose et al., *Facebook Struggles to Balance Civility and Growth*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/2020/11/24/technology/facebook-election-misinformation.html.

[26] David Ingram, *YouTube Pushed Trump Supporters Toward Voter Fraud Videos, Study Finds*, NBC NEWS (Sept. 1, 2022), https://www.nbcnews.com/tech/misinformation/youtube-pushed-trump-supporters-voter-fraud-videos-study-finds-rcna45708.

[27] *See* Nico Grant, *YouTube May Have Misinformation Blind Spots, Researchers Say*, N.Y. TIMES (Nov. 5, 2022), https://www.nytimes.com/2022/11/05/technology/youtube-misinformation.html.

The proliferation of disinformation on social media was a major contributor to false narratives and conspiracy theories attacking the outcome of the 2020 election,[28] culminating in the violent attack on the U.S. Capitol on January 6, 2021.[29] In a leaked draft report, the congressional January 6 Select Committee described how platforms ranging from Facebook, Twitter, and YouTube to Parler, Gab, and 4Chan, failed to stop disinformation, violent rhetoric, and tactical organization by users leading up to the insurrection.[30] Following the attack, the major platforms have lost interest in self-regulating to combat election disinformation on their services, even when their staff sound the alarm internally.[31]

In the leadup to the 2022 midterm elections, Truth Social, founded by former President Donald Trump, became "a key organizing platform for election deniers," including one group that used the platform to promote "stakeouts" of ballot drop boxes.[32] This voter intimidation tactic was also discussed on Twitter, Telegram, Gab, and Craigslist.[33]

Targeted advertising plays a key role in election disinformation and voter suppression. The ability to microtarget ads allows political actors to send suppressive messages to specific niches of the electorate without detection or transparency. In 2022, researchers ran an experiment submitting ads with blatantly false information

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[28] *See* Craig Silverman et al., *Facebook Groups Topped 10,000 Daily Attacks on Election Before Jan. 6, Analysis Shows*, WASH. POST (Jan. 4, 2022), https://www.washingtonpost.com/technology/2022/01/04/facebook-election-misinformation-capitol-riot/.

[29] *See generally* Ryan Goodman & Justin Hendrix, *January 6 Clearinghouse*, JUST SEC. (Dec. 1, 2023), https://www.justsecurity.org/77022/january-6-clearinghouse/.

[30] *See* Cat Zakrzewski et al., *What the Jan. 6 Probe Found Out About Social Media, But Didn't Report*, WASH. POST (Jan. 17, 2023), https://www.washingtonpost.com/technology/2023/01/17/jan6-committee-report-social-media/.

[31] *See* Steven Lee Myers & Nico Grant, *Combating Disinformation Wanes at Social Media Giants*, N.Y. TIMES (Feb. 14, 2023), https://www.nytimes.com/2023/02/14/technology/disinformation-moderation-social-media.html; Sheera Frankel & Cecilia Kang, *As Midterms Loom, Elections Are No Longer Top Priority for Meta C.E.O.*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/technology/mark-zuckerberg-meta-midterm-elections.html; Ryan Mac & Sheera Frankel, *Internal Alarm, Public Shrugs: Facebook's Employees Dissect Its Election Role*, N.Y. TIMES (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/technology/facebook-election-misinformation.html.

[32] Stuart A. Thompson & Matthew Goldstein, *Truth Social's Influence Grows Despite Its Business Problems*, N.Y. TIMES (Nov. 7, 2022), https://www.nytimes.com/2022/11/01/technology/truth-social-conservative-social-app.html.

[33] *See* Tiffany Hsu & Stuart A. Thompson, *Hunting for Voter Fraud, Conspiracy Theorists Organize 'Stakeouts'*, N.Y. TIMES (Aug. 10, 2022), https://www.nytimes.com/2022/08/10/technology/voter-drop-box-conspiracy-theory.html; *see also* Sheera Frankel, *On Social Media, Hunting for Voter Fraud Becomes a Game*, N.Y. TIMES (Nov. 4, 2022), https://www.nytimes.com/2022/11/04/technology/voter-fraud-social-media-games.html.

about voting to platforms, finding that TikTok approved 90% of the ads.[34] In 2016, the Trump campaign's data team put 3.5 million Black voters into a category for people they sought to deter from voting and used that categorization for Facebook ad targeting.[35] The number of Black voters in the "[d]eterrence" category was disproportionate to their share of the electorate in the swing states being targeted. The campaign targeted Black voters with negative ads designed to suppress turnout. The full extent of the campaign is unknown because there was no transparency as to what ads were sent to whom.[36]

Disinformation on social media in non-English languages, particularly Spanish, was rampant in the 2020 and 2022 election cycles and continues to be a major problem.[37] For example, Facebook ads targeting Hispanic populations inaccurately described prominent American politicians as "communist" and compared them to socialist presidents in South America.[38]

Ahead of the 2022 midterm elections, disinformation about election fraud, anti-discrimination policies, and reproductive rights saturated WeChat, a social media platform used by an estimated 60% of the Chinese American community.[39]

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[34] Jennifer Korn, *Facebook and TikTok Are Approving Ads with 'Blatant' Misinformation About Voting in Midterms, Researchers Say*, CNN (Oct. 21, 2022), https://www.cnn.com/2022/10/21/tech/facebook-tiktok-misinfo-ads/index.html.

[35] Channel 4 News Investigations Team, *Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016*, CHANNEL 4 NEWS (Sept. 28, 2020), https://www.channel4.com/news/revealed-trump-campaign-strategy-to-deter-millions-of-black-americans-from-voting-in-2016.

[36] *Id.*

[37] *See* Tiffany Hsu, *Misinformation Swirls in Non-English Languages Ahead of Midterms*, N.Y. TIMES (Oct. 12, 2022), https://www.nytimes.com/2022/10/12/business/media/midterms-foreign-language-misinformation.html; Kari Paul, *Facebook Must Tackle 'Spanish Language Disinformation Crisis', Lawmakers Say*, THE GUARDIAN (Mar. 16, 2021), https://www.theguardian.com/technology/2021/mar/16/facebook-spanish-language-disinformation-congress; CBS NEWS MIAMI, *Researchers Find WhatsApp Disinformation Campaigns Targeting Hispanic Voters in South Florida* (Nov. 1, 2020), https://www.cbsnews.com/miami/news/researchers-find-whatsapp-disinformation-campaigns-targeting-hispanic-voters/; Sabrina Rodriguez & Marc Caputo, *'This is F—ing Crazy': Florida Latinos Swamped by Wild Conspiracy Theories*, POLITICO (Sept. 14, 2020), https://www.politico.com/news/2020/09/14/florida-latinos-disinformation-413923.

[38] *See* Amanda Seitz & Will Weissert, *Inside the 'Big Wave' of Misinformation Targeted at Latinos*, ASSOCIATED PRESS (Dec. 1, 2021), https://apnews.com/article/latinos-misinformation-election-334d779a4ec41aa0eef9ea80636f9595.

[39] Kimmy Yam, *Right-Wing Disinformation Ramps Up on WeChat Ahead of Midterms, Report Finds*, NBC NEWS (Oct. 3, 2022), https://www.nbcnews.com/news/asian-america/right-wing-disinformation-ramps-wechat-ahead-midterms-report-finds-rcna50539.

Users searching Google in 2020 for terms such as "register to vote," "vote by mail," and "where is my polling place" were met with voter registration ads that charged users to register to vote while mining their data.[40]

A political action committee linked to a former member of Congress sent robotexts to Kansas voters to trick them into voting contrary to their preferences on a ballot initiative seeking to remove legal protections for abortion.[41]

Finally, Meta developed an AI chatbot, and within a few days of studying online chatter, it began spreading election denialism and antisemitic conspiracy theories.[42]

All these examples point to a clear conclusion. The harm of algorithmic discrimination and bias should be taken seriously, but also carefully. Election conspiracy theories do not meet a baseline standard of evidence and cannot be allowed to be used to inflict other real-world harms on voters of color while actual technological advances are used to purposely dilute the power of voters of color and attack their participation in our elections.

4. Groups with different viewpoints have weighed in on algorithms. Some suggest that more transparency is needed, while others want more privacy. Can you provide your perspective on whether more or less transparency is needed when it comes to algorithms?

Privacy and transparency are complimentary, not oppositional. Because there is no comprehensive regulation of algorithmic systems, nor mandated human oversight, algorithms can produce a myriad of harms, including discrimination and bias, without being detected. Having transparent requirements about how algorithms are trained, used, and deployed increases consumer awareness and choice, while preventing harm. Transparency as to how systems work or are designed, how models are built, what data is used, and what personal identifying information is collected all create necessary conditions for individuals to make informed choices about how they interact with products and services. Transparency also empowers individuals to make informed decisions about how to protect their privacy— including whether to interact with a system, provide their personal information, or consent to data collection.

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[40] CBS NEWS BAY AREA, *Google Removes Misleading Ads Related to Voting, Elections*, (June 30, 2020), https://www.cbsnews.com/sanfrancisco/news/google-removes-misleading-ads-voting-elections/.

[41] Isaac Stanley-Becker, *Misleading Kansas Abortion Texts Linked to Republican-aligned Firm*, WASH. POST (Aug. 2, 2022), https://www.washingtonpost.com/politics/2022/08/02/kansas-abortion-texts/.

[42] Christianna Silva, *It Took Just One Weekend for Meta's New AI Chatbot to Become Racist*, MASHABLE (Aug. 8, 2022), https://mashable.com/article/meta-facebook-ai-chatbot-racism-donald-trump.

Additionally, baseline privacy standards also help generate transparency. When data is collected only for the purposes of effectuating what consumers expect of a product, transparency about what information is collected and how algorithmic tools work is enhanced. The best way to protect private data is to not collect unnecessary data in the first place. Currently, we have a notice and consent framework, meaning companies create long, dense, and untransparent privacy policies, which consumers must agree to in order use a service, giving companies permission to make virtually any use of data they choose. Companies therefore collect, use and share vast amounts of personal data when developing or deploying algorithmic systems, leading to security risks, discriminatory practices, predatory advertising, and fraud based on personal information – often without the knowledge of the consumer themselves.

Enhancing transparency and protecting data privacy must go hand in hand to give consumers greater control over their personal data and how they interact with the marketplace.

5. Do you believe that large companies and platforms can use algorithms to stifle innovation or small businesses?

Yes. Innovation is particularly important to communities of color who have traditionally been shut out of the market or discriminated against because of the legacy of segregation and redlining. For instance, in 2020, Black people represented 14.2% of Americans, but only 2.4% of all employer-firm owners.[43] The unfair and discriminatory outcomes of algorithmic systems stifle responsible innovation and serve to exacerbate existing disparities. The median Black household has only about 15 percent of the wealth held by the median White household, about $44,900 compared to $285,000 in total assets.[44]

If large platforms or companies use existing data to lock in market power or current wealth dynamics, we know that they will be doing so at the expense of consumers of color and of Black and Brown entrepreneurs. Equal opportunity creates innovation by allowing those with diverse experiences and characteristics to participate in the market fully. If those with more market power or resources use algorithmic technologies to have an unfair advantage and consolidate monopoly, we expect that to come at the expense of consumers and entrepreneurs of color, who already face significant barriers to fair and equal participation in the market. That is unacceptable and should be addressed by Congress.

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[43] Andre M. Pery et al, *Who is Driving Black Business growth? Insights from the Latest Data on Black-Owned Businesses*, BROOKINGS (May 24, 2023), https://www.brookings.edu/articles/who-is-driving-black-business-growth-insights-from-the-latest-data-on-black-owned-businesses/.

[44] Aladangady, Aditya, Andrew C. Chang, and Jacob Krimmel, *Greater Wealth, Greater Uncertainty: Changes in Racial Inequality in the Survey of Consumer Finances*, FEDS Notes. Washington: Board of Governors of the Federal Reserve System, Oct. 18, 2023, https://doi.org/10.17016/2380-7172.3405.

However, algorithmic harms are not just perpetuated by large companies. The rights of individuals, particularly those with a historical record of being marginalized, must be of primary importance to lawmakers.

6. What do you believe is the role of government in regulating algorithms? What, if any, unintended consequences would there be if Congress gets involved?

The persistence and proliferation of discriminatory conduct perpetuated through algorithms highlights the need for further action by the government. Government action is critical in ensuring equal access to the marketplace. When a firm imposes a greater burden on some people to access opportunities because of their protected characteristics, the additional time, money, effort, or humiliation to overcome that hurdle is an injury.[45] The "imposition of a barrier" creates "the inability to compete on equal footing."[46] Thus, even if alternative services are available—and they are equal—it is inherently unjust and unfair to require consumers to avoid the harm. An individual cannot reasonably avoid discrimination because the very act of avoidance itself is a form of segregation that causes a substantial injury. We are all better off if equal opportunity is protected; compliance burdens or other effects of legislation are sound investments in a freer, fairer, and more innovative future marketplace.

The Lawyers' Committee commends the Biden-Harris Administration for taking a series of actions to mitigate the risks of AI and algorithmic tools, including by outlining key principles for advancing civil rights and equity in the Blueprint for an AI Bill of Rights,[47] Executive Order 14091 ("Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government"),[48] Executive Order 14110 ("Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence"),[49] and the Office of Management and Budget's proposed memorandum on agency use of AI.[50] Together, these actions direct agencies across the federal government to use their existing authorities to prevent and remedy algorithmic discrimination.

Ultimately however, we need action from Congress to fully address the extent of the algorithmic harms happening today. Congress should enact legislation regulating the use of algorithmic technologies that prioritizes civil rights and consumer protections. That is why the Lawyers' Committee is urging Congress to pass the "Online Civil

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[45] *See, e.g.*, *Heckler*, 465 U.S. at 740.

[46] *Ne. Fla. Chapter of Ass'n Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993).

[47] *Blueprint*.

[48] Exec. Order No. 14091, 88 Fed. Reg. 10825 (Feb. 16, 2023).

[49] Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

[50] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, Proposed Memorandum, Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (Nov. 1, 2023), https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf.

Rights Act," and calling on Congress to protect civil rights *and* promote responsible development and use of Artificial Intelligence.